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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK  
Case Nos. 08-13555 (JMP) ; 08-01420 (JMP) (SIPA)

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In the Matter of:

LEHMAN BROTHERS HOLDINGS INC., et al.  
Debtors.

- - - - -x

In the Matter of:

LEHMAN BROTHERS INC.  
Debtor.

- - - - -x

United States Bankruptcy Court  
One Bowling Green  
New York, New York

September 29, 2010  
3:03 PM

B E F O R E:  
HON. JAMES M. PECK  
U.S. BANKRUPTCY JUDGE

1  
2 CONTINUED EVIDENTIARY HEARING re (i) Motion of Debtor to Modify  
3 the September 20, 2008 Sale Order and Granting Other Relief;  
4 (ii) Motion of the Trustee for Relief Pursuant to the Sale  
5 Orders or, Alternatively, for Certain Limited Relief Under Rule  
6 60(b); (iii) the Motion of Official Committee of Unsecured  
7 Creditors of Lehman Brothers Holdings Inc., Authorizing and  
8 Approving (A) Sale of Purchased Assets Free and Clear of Liens  
9 and Other Interests and (B) Assumption and Assignment of  
10 Executory Contracts and Unexpired Leases, Dated September 20,  
11 2008 (and Related SIPA Sale Order) and Joinder in Debtors' and  
12 SIPA Trustee's Motions for an Order Under Rule 60(b) to Modify  
13 Sale Order; (iv) All Joinders Thereto and Related Adversary  
14 Proceedings; and (v) Motion of Barclays Capital Inc. to Enforce  
15 the Sale Order and Secure Delivery of All Undelivered Assets  
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25 Transcribed by: Lisa Bar-Leib

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A P P E A R A N C E S :

JONES DAY

Attorneys for the Movant, LBHI

222 East 41st Street

New York, NY 10017

BY: ROBERT W. GAFFEY, ESQ.

JAYANT W. TAMBE, ESQ.

HUGHES HUBBARD & REED LLP

Attorneys for Movant, James W. Giddens, SIPC Trustee

One Battery Park Plaza

New York, NY 10004

BY: WILLIAM R. MAGUIRE, ESQ.

BOIES, SCHILLER & FLEXNER LLP

Attorneys for Barclays Capital, Inc.

333 Main Street

Armonk, NY 10504

BY: JONATHAN D. SCHILLER, ESQ.

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BOIES, SCHILLER & FLEXNER LLP  
Attorneys for Barclays Capital, Inc.  
401 East Las Olas Boulevard  
Suite 1200  
Fort Lauderdale, FL 33301

BY: TODD THOMAS, ESQ.

STUTMAN TREISTER & GLATT  
Attorneys for Elliot Management  
1901 Avenue of the Stars  
12th Floor  
Los Angeles, CA 90067

BY: ANTHONY ARNOLD, ESQ.  
WHITMAN L. HOLT, ESQ.  
(TELEPHONICALLY)

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P R O C E E D I N G S

THE COURT: Good morning. Be seated, please. Good afternoon. When last we were together, we were going to argue something about Mr. Fogarty's deposition testimony.

MR. MAGUIRE: If it please the Court, Bill Maguire for the SIPA trustee. Your Honor, we have a foundation objection to Mr. Fogarty's testimony. And since the Court has already heard that testimony, there's only one very discreet portion as to which we're pressing the objection. And that is, specifically, to the testimony that he provided at page 51 starting at line 3 through 11 and then again on page 51 starting at line 19 through the following page at line 2. And that specifically is where Mr. Fogarty is asked about the parenthetical that was added to the clarification letter concerning property held to secure exchange traded derivatives. And the basis for our objection is the testimony at which was played that Mr. Fogarty has no basis to offer that testimony. Specifically, at page 48 at line 7, he testified, "Because I didn't fully understand the transaction, we were -- I was never sure of anything in that transaction." And again, at page 49, he was asked about the parenthetical, specifically about the very words that he's asked about, and on page 50, at line 5, he answers, "I don't understand this piece." He's asked then whether he recalls asking Weil to clarify. He says he does not. He's asked at line 9:

1 "Q. Do you know if you had an understanding of that at the  
2 time?

3 "A. I don't recall focusing on the exchange-traded  
4 derivatives."

5 He is asked again:

6 "Q. And just to be clear, it's your testimony that you're not  
7 sure if the parenthetical 'and any property that may be held to  
8 security obligations under such derivative' is referring to  
9 collateral or not?"

10 He starts to answer: "I don't". There's an  
11 objection. He continues the answer:

12 "A. I don't understand that what means.

13 "Q. Do you believe it to be referring to collateral?

14 "A. Property -- I read it to -- it reads as property."

15 I think it's fairly clear from the witness' testimony  
16 there and elsewhere in the transcript about how befuddled he  
17 was and the lack of knowledge he has that he has no basis to  
18 interpret a legal document or, frankly, to give any  
19 understanding that would be of any assistance to the trier of  
20 fact.

21 MR. THOMAS: Your Honor, Barclays offers his testimony  
22 solely for the witness' state of mind not for the legal  
23 interpretation of that provision.

24 THE COURT: The fact that he was befuddled about the  
25 document? I don't understand what you mean by solely for his

1 state of mind.

2 MR. THOMAS: Well, Your Honor, if I could pull up the  
3 transcript pages at issue, what he is originally asked about  
4 his understanding of that provision -- and the blue designated  
5 portions are portions of this transcript that are designated by  
6 movants. And on the left page, page 50, you can see his  
7 initial answer to these lines of questions is "I don't know."  
8 But when pressed further and asked if he understood -- "My  
9 question to you" -- in yellow on page 51:  
10 "Q. My question to you is, do you believe that that's  
11 referring to collateral?"

12 And he said presumably they're the same thing. So  
13 he's giving -- they have designated the blue portion. They  
14 have designated the answer that they like to some of the same  
15 questions. By -- their objection would have the effect of  
16 making his testimony incomplete and, we would say, inaccurate  
17 on this issue.

18 THE COURT: Well --

19 MR. THOMAS: In his state of mind --

20 THE COURT: Let me just break in for one second. I'm  
21 just trying to understand the scope of the objection raised by  
22 Mr. Maguire. How much of the testimony that we're talking  
23 about is within the scope of the objection? Is it only the  
24 yellow or is it yellow and blue?

25 MR. MAGUIRE: It's just the yellow, Your Honor. I

1 believe it's line 3 through 11 and then I believe it's 19  
2 through I think it might go over to the beginning of the next  
3 page.

4 THE COURT: Frankly, I'm inclined to wipe everything  
5 out, blue and yellow, relating to this subject and found none  
6 of it to be particularly helpful or probative of anything. And  
7 this witness' state of mind on this subject is a matter of no  
8 particular concern to me. I don't understand why any of this  
9 is, frankly, in the record. When we were looking at the  
10 videotape yesterday, I guessed right that this was going to be  
11 the subject of your objection and, frankly, did not see  
12 anything valuable in his testimony. If you can tell me how  
13 it's probative of anything, that would be helpful, too. I'd  
14 like an offer of proof.

15 MR. THOMAS: Yes, Your Honor. I'd be happy to. The  
16 witness' understanding and movants' understanding here are  
17 relevant for a number of reasons. One is because the timing of  
18 this issue of their motion and the legal bars that Barclays  
19 submits preclude their claims. In response, they are seeking  
20 to alter a sale order which they obtained and defended all the  
21 way through appeal in March of 2009. Their justification for  
22 doing that is, in large part, that they did not understand the  
23 terms of the sale contract. A&M says in their reply -- LBHI  
24 says in their reply brief, A&M struggled for months to  
25 understand what happened in the sales contract. The committee



1 says in their reply brief, on the Rule 60 motion, says "The  
2 committee did not develop a meaningful understanding of the  
3 sales transaction until after receiving Rule 2004 discovery."  
4 That is their defense to the legal bars. And we respectfully  
5 submit that evidence showing that they were informed about the  
6 terms of the sales transaction and they had an understanding  
7 about the general terms and what was being conveyed.

8 THE COURT: What does that have to do with the  
9 testimony in question, though? The testimony in question,  
10 unless I'm missing something, is about that famous  
11 parenthetical in the clarification letter. The witness had  
12 nothing to do with the clarification letter, acknowledged  
13 during questioning that he really didn't fully understand the  
14 clarification letter or the transaction at all. I understand  
15 the general points you're making but I don't understand how  
16 this witness' testimony in yellow advances the point you're  
17 trying to make. Maybe if you go through the particular  
18 questions and answers and connect it to your argument I'll  
19 understand it better. But I don't get it right now.

20 MR. THOMAS: Absolutely, Your Honor. The -- it is  
21 relevant if Alvarez & Marsal, as administrator of the LBHI  
22 estate and reporting to the committee -- if they had an  
23 understanding that this group of assets, exchange traded  
24 derivatives and related collateral, was going over to Barclays  
25 as part of the deal -- they had that understanding and had the

1 understanding it wasn't contained, for example, in the estimate  
2 of trading assets. Also if they had this understanding and it  
3 was going over and they didn't know what the amount was of  
4 those assets then as a matter of Black Letter contract law,  
5 they are deemed to have assumed a risk associated with that  
6 uncertainty. And there's case law saying that that cannot be  
7 the basis of a Rule 60 motion from estate which is what they  
8 have here. They allege --

9 THE COURT: But we're just talking about certain  
10 excerpts from the testimony of one witness who, frankly,  
11 limited the weight to be accorded his testimony throughout by  
12 noting repeatedly that he didn't understand the transaction  
13 which is somewhat helpful to the movants' case because he said  
14 repeatedly he didn't understand the transaction. It's also  
15 true that A&M had nothing to do with the sale transaction.  
16 That's absolutely clear. So, I'm not sure what we're getting  
17 at by hammering on the yellow. What's in the yellow that is  
18 competent evidence?

19 MR. THOMAS: The competent evidence just in the  
20 yellow --

21 THE COURT: I'm barely -- I'm having a very hard time  
22 reading it because it's so faint even when I've looked closely.  
23 Let's just see what we're talking about?

24 "Q. It reads as 'any property that may be held to security  
25 obligations under such derivative."

1 I think that's probably a typo. Probably should mean  
2 "to secure obligations" instead of "to security". But that's  
3 how it reads. "My question to you is do you believe that  
4 that's referring to collateral?"

5 "Objection."

6 "A. Property held for security obligations and collateral  
7 presumably are the same thing."

8 Now let's just stop with that answer. How does that  
9 help me find any disputed fact in this case?

10 MR. THOMAS: Your Honor --

11 THE COURT: That's completely vague evidence from a  
12 lay witness who is not a lawyer, who had nothing to do with  
13 crafting the language and who while I found to be extremely  
14 credible as a video witness, very clearly knows nothing about  
15 this subject and doesn't help me.

16 MR. THOMAS: Your Honor --

17 THE COURT: By the way, much of his testimony doesn't  
18 help me.

19 MR. THOMAS: May I respond?

20 THE COURT: Sure.

21 MR. THOMAS: The witness testified that he was  
22 specifically charged with understanding in September of 2008  
23 not only the terms of the contract including this disputed term  
24 of the contract but also understanding what went over. Movants  
25 are saying they didn't have any understanding of the contract

1 and that's a big part of their justification on waiting a year  
2 to bring these issues to the Court. This is evidence the fact  
3 that he understood. He did testify that he reviewed the  
4 clarification letter and attempted to understand its  
5 provisions. This is evidence that he understood that there was  
6 this bucket of assets, ETD collateral, going over to Barclays.  
7 And that is relevant because as part of now what they're saying  
8 they didn't understand -- they didn't understand Barclays was  
9 going to get all these assets. They didn't understand that the  
10 assets -- Barclays might get a gain. It's relevant if -- this  
11 person's knowledge, a managing director of Alvarez & Marsal, is  
12 clearly imputed to Alvarez & Marsal and the estate. Now we  
13 would say, as a legal matter in the Second Circuit, that all of  
14 the knowledge of the actual individuals for Lehman negotiating  
15 the deal is imputed to the movants. But as an alternative,  
16 certainly the fact that Alvarez & Marsal people understand the  
17 terms of the deal is very relevant for a number of contract  
18 arguments -- issues and for the issues of whether they have  
19 waived, they're estopped, whether there could be an exception  
20 to the mandate rule.

21 THE COURT: I hear all the arguments you're making but  
22 we're talking about two lines of testimony. Connect what  
23 you've said to those --

24 MR. THOMAS: Okay.

25 THE COURT: -- two lines of testimony.

1 MR. THOMAS: These two lines of testimony, when read  
2 together, says that Alvarez & Marsal, unquestionably Lehman at  
3 this time --

4 THE COURT: I don't think you can use the word  
5 "unquestionably" --

6 MR. THOMAS: Sorry.

7 THE COURT: -- in anything you're telling me right  
8 now --

9 MR. THOMAS: Sorry.

10 THE COURT: -- because I saw the same video that you  
11 saw. And I saw a witness repeatedly say that, despite best  
12 efforts, he didn't really understand this transaction all that  
13 well. And this is consistent with that theme in his testimony.  
14 To say that he is somehow acknowledging an important point in  
15 your case in this little excerpt I think is stating too much.  
16 I also think you should never say "unquestionably" to me --

17 MR. THOMAS: I withdraw that. I'm sorry.

18 THE COURT: -- because everything that we're doing  
19 here demonstrates that there are meaningful questions.

20 MR. THOMAS: I withdraw it. May I --

21 THE COURT: Sure.

22 MR. THOMAS: -- May I finish on this particular point?  
23 It is a theme of their case that they didn't understand the  
24 contract and he said it about 500 times -- he said it many  
25 times during his deposition. But this is evidence that they

1 really did, when you get down to the specifics, they understood  
2 the basics of the deal. They reviewed the contracts, they met  
3 with Weil, they met with Lehman personnel to understand the  
4 deal. Here, this is just evidence that he understood that, as  
5 part of the sale transaction, one of the things going over to  
6 Barclays was ETD associated collateral and that included cash.  
7 And that's relevant -- their knowledge of that at this point in  
8 time in September of 2008 is relevant.

9 THE COURT: Okay. I hear your argument. I'm unmoved  
10 by it. And I don't view, frankly, the yellow or the blue as  
11 probative of very much. I believe that Mr. Fogarty gave very  
12 credible testimony but testimony that wasn't particular useful  
13 for either side. When I saw the testimony as it was being  
14 played yesterday morning, my immediate reaction, because I knew  
15 there was an objection, was that the objection would likely be  
16 about the parenthetical. Because as I was hearing him testify  
17 about the parenthetical, I viewed him as having no basis for  
18 giving any testimony with respect to the parenthetical  
19 including all of the yellow. So the objection is sustained.  
20 And to the extent that means that the yellow is stricken, it's  
21 stricken.

22 But I hear your points. I just think your points are  
23 overstated relative to this disputed testimony.

24 MR. THOMAS: Your Honor, may I introduce Mr. Coles,  
25 the next video witness?

1 THE COURT: Oh, sure.

2 MR. THOMAS: I'm sorry.

3 THE COURT: Are there any objections as to his  
4 testimony?

5 MR. GAFFEY: Not from the debtor, Your Honor.

6 MR. THOMAS: With the Court's permission, we'd like to  
7 distribute a binder with the relevant exhibits to the  
8 deposition.

9 THE COURT: Okay.

10 MR. THOMAS: And, Your Honor, David Coles was a  
11 managing director at Alvarez & Marsal at the time of the sales  
12 transaction and became LBHI's CFO, comptroller and co-treasurer  
13 on or about September 26th, 2008. And --

14 THE COURT: How long is this?

15 MR. THOMAS: It's forty-eight minutes, Your Honor.

16 THE COURT: Okay.

17 MR. THOMAS: And if I might add just two more  
18 sentences for why we're offering him. He was -- briefly. He  
19 was mentioned at the end of Mr. Fogarty's deposition as being a  
20 person who worked on matters such as the transaction  
21 adjustments to the balance sheet involving comp and cure. And  
22 he was also mentioned as someone who was at the meeting where  
23 the liability and/or valuation issue was discussed.

24 (Begin playing video deposition testimony of David Coles)

25 DIRECT EXAMINATION

1 BY MR. THOMAS:

2 Q. Mr. Coles, can you please state your full name and address  
3 for the record?

4 A. David James Coles, 21 East 66th Street, New York, NY  
5 10065.

6 Q. Can you please give a brief general description of your  
7 educational background?

8 A. Sure. I a UK chartered accountant. I have a degree in  
9 economics. And I started my career with Arthur Andersen in the  
10 UK. I spent about four years in the audit practice before  
11 moving across into corporate recovery. I went by the -- I've  
12 got a lot of investigations on behalf of secured lenders and  
13 one or two companies in receivership. And then I had the  
14 opportunity towards the end of my sixth year at Andersen UK to  
15 move across to the U.S. and move to Andersen's New York office  
16 and was there for about two years doing turnaround type work.  
17 And then at the end of that two years, I started work with  
18 Alvarez & Marsal who were CRO on an assignment. And we were  
19 providing support to the CRO. And then for the next two years,  
20 I was largely working with A&M but still an employee of  
21 Andersen. So at the end of those two years, I had gotten my  
22 green card, felt comfortable about leaving Andersen and  
23 switched across to A&M. And at that time, A&M was less than  
24 twenty people. I think today is seventy, I believe. So that  
25 would be thirteen years ago. And I've been a managing director



1 since 2000.

2 Q. In the last two years at A&M, how would you describe your  
3 duties and responsibilities?

4 A. The last few years had been culmination of management  
5 roles in turnarounds and management roles that have often led  
6 to liquidations and wind downs.

7 Q. And -- but for nonaccounts, can you describe generally  
8 what turnarounds are?

9 A. Yes. Turnarounds is where there might be a salvageable  
10 business and you're attempting to improve the operations,  
11 perhaps refinance it. Usually it doesn't involve a bankruptcy.  
12 And then a liquidation probably does involve a bankruptcy and  
13 there's no go forward enterprise.

14 Q. And what is your current position today?

15 A. I am chief restructuring officer at Finlay Enterprises  
16 Inc. which at one point was a billion dollar jewelry retailer  
17 that -- it ran the jewelry concessions with any number of  
18 department store chains. And then in the late 2000s, it  
19 diversified into specialty stores and we weren't able to  
20 salvage as a go forward business enterprise either and so  
21 liquidated through this past (indiscernible).

22 Q. Are you still a managing director at Alvarez?

23 A. Yes.

24 Q. When did you move over to Finlay?

25 A. Finlay commenced in mid-February 2009.

1 Q. When did you first have any interaction with Lehman?

2 A. September 16th, 2008.

3 Q. When you switched to Finlay in February of '09, did that  
4 kind of end your involvement with Lehman?

5 A. Substantively yes. I remained a director and might still  
6 be a director of some (indiscernible) foreign subsidiaries.  
7 We've been slowly moving me off those slates but it's a very  
8 complex old chart so I may still be hanging up there on a few  
9 slates.

10 Q. On about September 26th, 2008, were you appointed CFO of  
11 Lehman?

12 A. I don't remember the exact date. That would sound about  
13 right.

14 Q. CFO, comptroller and co-treasurer?

15 A. I think that's right, too.

16 Q. Do you still hold any of those titles?

17 A. No.

18 Q. And approximately how long did you function as CFO of  
19 LBHI?

20 A. Through probably mid-February of 2009.

21 Q. And in a turnaround environment like this, what does the  
22 CFO/comptroller/co-treasurer do?

23 A. Well, this one, I think, early on we realized it wasn't a  
24 turnaround. It was a controlled wind down liquidation. It  
25 was -- job number one really was trying to control cash and get

1 a sense for liquidity. It was trying to support each of the  
2 separate business units. And it was taking stock of the assets  
3 and balance sheets of all of the entities that we now found  
4 ourselves responsible for. So this was the residual estate  
5 following the sale to BarCap and also subsequent to the other  
6 administrations going on in the world, in Asia and in Europe.

7 Q. Was part of that effort or process of taking stock -- did  
8 it involve an assessment of what assets and liabilities had  
9 gone over to Barclays as part of the transaction and what had  
10 stayed at Lehman?

11 A. Yes.

12 Q. I'm going to show you a document that we'll mark as 583A.  
13 (BCI Exhibit 538A, e-mail involving Martin Kelly, was hereby  
14 marked for identification as of this date.)

15 This is an e-mail -- the second internal e-mail -- excuse me --  
16 the first internal e-mail from him to Kelly Martin (sic).

17 Says, "I'd like to inquire about your availability to meet with  
18 David Coles, Jim Fogarty and myself for about an hour to review  
19 the balance sheet and, in particular, the anticipated post-  
20 transaction balances." Is that -- "post-transaction balances",  
21 does that refer to the effort to make sure Lehman had taken  
22 stock of the assets and liabilities that went over to Barclays  
23 and the ones that stayed behind that you were responsible for?

24 A. Yes.

25 Q. Okay. And did you in fact meet on or about September 28th

1 with -- September 18th -- excuse me -- 2008 with Kelly Martin?

2 A. I can't recall. Actually, it's Martin Kelly.

3 Q. Martin Kelly. Thank you. You recall having any meetings  
4 with him that first week of the Lehman bankruptcy?

5 A. I can't recall that it was the first week. I do remember  
6 a couple of meetings that Martin attended. We did attempt to  
7 go through the trial balance that he was compiling.

8 Q. Would that have been sometime between the filing of the  
9 bankruptcy around the 15th of September and before the closing  
10 of the Barclays transaction on the 22nd of September?

11 A. Probably -- I'm not sure. But it certainly was in those  
12 first two weeks post-filing.

13 Q. Okay. And here there's a reference by Mr. Kelly for  
14 making this meeting happen today, September 18th. Did you know  
15 one way or the other whether it happened on that day?

16 A. I don't.

17 Q. Do you recognize this e-mail chain involving you dated  
18 September 18th and 19th of 2008?

19 A. I don't.

20 Q. You mean -- you have any reason to doubt that this was an  
21 e-mail chain that you participated in?

22 A. No.

23 Q. The e-mail that appears to be from you on September 18th  
24 to Kristi Wong -- can you recall who Kristi Wong is?

25 A. Yes.

1 Q. Who is that?

2 A. She worked under Martin Kelly. So was -- as an accounting  
3 manager. And I think Martin Kelly was comptroller.

4 Q. Okay. In what appears to be here an e-mail, you write,  
5 "Some colleagues and I met with Martin Kelly on Tuesday" -- I  
6 guess, as an initial matter, that Tuesday would be September  
7 16th -- "on Tuesday and discussed the consolidated balance  
8 sheet and the likely post-BarCap sale, BS." Do you see that?

9 A. Yes.

10 Q. Does that refresh your recollection as to the time frame  
11 in which you would have met with Mr. Kelly?

12 A. Yes.

13 Q. So was that on approximately September 16th, 2008?

14 A. Yes.

15 Q. And a reference to "the likely post-BarCap sale, BS". Can  
16 you just break that out what you mean?

17 A. Yes. So there would have been a consolidated balance  
18 sheet at the time of the sale. What we were looking to get  
19 from Martin and Kristi was a breakout of what assets might and  
20 liabilities were being sold or assumed by BarCap pursuant to  
21 that sale and what was left with the residual estate that we as  
22 LBHI's new executive office group had responsibility for.

23 Q. Okay. But at some point you had discussions with Weil  
24 Gotshal about the terms of the sale transaction and what was  
25 conveyed --

1 A. Yes.

2 Q. -- and what wasn't. Do you see "Bonus Payable", "Cure  
3 Amounts", Accounts Payable"? Do you see those lines?

4 A. Yes.

5 Q. And in following those lines over, do you see that there's  
6 a -- listed as a two billion dollar transaction adjustment  
7 crossing the "Bonus Payable" amount?

8 A. Yes.

9 Q. Do you have any understanding as to the reason for that  
10 transaction adjustment?

11 A. Yes. I made a note before getting this sheet but it was  
12 my understanding that the transaction with BarCap had a feature  
13 in it whereby BarCap assumed a -- the bonus pool for the  
14 employees it offered positions to. And in addition, it sought  
15 to have the estate assume and assign a vast quantity of  
16 executory contracts. And this was an estimate of the cure  
17 amounts necessary to be able to effect that.

18 Q. That's from the second line?

19 A. Yes.

20 Q. And what was the basis -- let's break it down. On the  
21 compensation -- first of all, did you read the asset purchase  
22 agreement or the final purchase agreement as amended by the  
23 clarification letter?

24 A. I may have had a copy. I don't now recall whether I read  
25 it page for page or simply got like an executive summary of it.

1 A colleague of mine, Jim Fogarty, was more on point on the  
2 transaction in those first few days.

3 Q. Do you know if the accrual amounts with respect to  
4 compensation also included severance -- potential severance  
5 liability that Barclays was assuming as far as the purchase  
6 agreement?

7 A. I don't recall.

8 Q. What was -- for whatever understanding you had with  
9 respect to the compensation or the transaction adjustment here,  
10 what was the basis for that understanding?

11 A. To the extent that the purchase of BarCap was assuming the  
12 liability that would otherwise have been paid by LBI then it  
13 was taking credit for the assumption of those liabilities in  
14 arriving at its net purchase consideration.

15 Q. Who told you that?

16 A. I think I got that from my lead at the (indiscernible).

17 Q. And was it your understanding whether the number that was  
18 encapsulated is an estimate of what Barclays actually would  
19 assume in terms of cure based upon their election of certain --  
20 another U.S. contract or was it an estimate of potential  
21 exposure meaning that Barclays could incur up to that amount if  
22 they assumed all the contracts?

23 MR. GAFFEY: Objection to form of the question.

24 A. Not exactly (indiscernible). It -- what I had typically  
25 seen and what I would have assumed here is that the number is

1 the maximum exposure. And then you typically see a purchaser  
2 use its existing business relationships with numbers to  
3 negotiate lesser amounts.

4 Q. Is it your understanding in this transaction that Barclays  
5 had the discretion to pick and choose which contracts it was  
6 going to assume?

7 MR. GAFFEY: Objection to form.

8 A. That it is the case, yes.

9 Q. Based on the 19th, can you recall whether when you got  
10 this, did that kind of stand to you seeing the large  
11 transaction investments?

12 A. It wasn't the largest number on there. In those early  
13 days of being on the case, our whole -- I think my whole team  
14 struggled with a renewed -- sorry -- a new level of materiality  
15 that had come into play here because we were dealing with  
16 billions of -- almost trillions of dollars. So I think I would  
17 have noted that column. I would have been perhaps more  
18 interested in the liquidity situation to make sure that those  
19 assets that were very liquid were under my control, secure, and  
20 that I was the custodian of those.

21 Q. So your understanding of this transaction investment  
22 figure here that you call the 1645, that -- at this -- so  
23 somebody at this point would have already -- someone in office  
24 services would have already tried to compile all those  
25 contracts and come up with a number?



1 MR. GAFFEY: Objection to the form of the question.

2 A. I'm not exactly sure how that number was arrived at  
3 specifically. I know that the tasks that that group were  
4 undertaking -- I did mention that it was usually a Herculean  
5 task for an organization to reach out across its subsidiaries,  
6 get a copy of every executory contract and then attempt to  
7 figure out how much could be -- would need to be paid to cure  
8 it. If this came out on -- came to me probably on the 19th, so  
9 it might have been done on the 18th, that was pretty  
10 spectacular to get that close to the real number for what must  
11 have been thousands of executory contracts.

12 Q. So that's a number that would just be in existence on your  
13 system that you could pull up? It involved a lot of work.

14 A. I've never seen it maintained that way.

15 Q. Have you seen and experienced those estimates ending up  
16 being off by a wide margin?

17 A. Yes. But if on the trying to identify the pool and then  
18 by what ultimately a purchaser might be able to negotiate to  
19 get these contracts assumed and assigned out.

20 Q. Is that based on your experience in the business? Is it  
21 understood that these are fairly, you know, rough estimates and  
22 difficult estimates to come up with?

23 A. It's easier to know the -- it's difficult to work out the  
24 total potential exposure but it's possible, and then from that  
25 total exposure it's typical for the actual liability that is

1 settled by a purchaser to be markedly lower than that.

2 Q. And so you're getting this on -- it looks like the 19th,  
3 and you may not remember the exact timeline or dates but just  
4 kind of order of magnitude, you had gotten this the 19th, when  
5 do you think you would have kind of gone over it and met with  
6 these folks to get a sense of how this was calculated?

7 A. Probably within seven days of receiving this.

8 Q. Did you have any follow-up after that with them?

9 A. Yes, and this group was also a group that I seem to recall  
10 we were very dependent on to run our back office with the  
11 estate because so many of the systems and processes went across  
12 with BarCap that we, the residual estate, needed that  
13 transition of services agreement back with BarCap for BarCap to  
14 provide us with things that we were used to having and which  
15 were essential.

16 So my discussions with Terry and people who worked with  
17 Terry would have been in connection with this cure payment  
18 amount generally but also the process and also the process of  
19 providing the residual estate with transitional services. His  
20 group, for instance, would have managed -- within that group  
21 and that building they managed the whole tiny reimbursement for  
22 that travel and entertainment and we needed to continue to  
23 operate systems as they had operated before and keep employees  
24 in place to manage down the assets, so it was important that we  
25 had a process by which we could determine who was an employee

1 of the estate, who was an employee of -- now of BarCap and how  
2 we were going to settle out people's T&E, for instance.

3 Q. And when you got that sense of understanding how they had  
4 calculated this transaction adjustment for cure amounts,  
5 was -- did it seem like they had undergone a reasonable process  
6 in trying to come up with that amount to you, or did you have  
7 any further questions or --

8 A. I don't think I was --

9 MR. GAFFEY: Objection to the form of the question.

10 A. I don't think I was in a position to know how thorough  
11 that was. I do remember reflecting on the enormity of the  
12 task. I don't now remember how many contracts that comprised  
13 but I believe it was the biggest thing that anybody had seen at  
14 that point in terms of a company going through a bankruptcy  
15 that had such short notice with such little planning.

16 Q. And what was that? Would that be a short amount of time,  
17 a couple of days to come up with that type of estimate?

18 A. I don't think so. I mean, this -- this was presumably the  
19 best they could come up with in two days. It can take a lot  
20 longer than that.

21 Q. Yeah. I guess what I was asking, compared to other  
22 situations, was having just a couple of days to come up with  
23 these estimates a shorter period of time than you have seen in  
24 other situations?

25 A. It was very short.

1 Q. And then so they explained what they had done and then was  
2 there -- did you have any follow-up beyond that in terms of any  
3 further occasion to -- for looking precisely how they had done  
4 the estimate in more details?

5 MR. GAFFEY: Objection to form of the question.

6 A. I didn't think -- I didn't think -- I myself didn't  
7 further explore the original estimate, but we did check in from  
8 time to time on how much had actually been incurred to assume  
9 and assign contracts, and I remember that number being very low  
10 relative to 1,645. I seem to recall it being around 300  
11 million around the time that I left, which would have been in  
12 mid February.

13 Q. Were you surprised by how much lower the actual amount of  
14 cure assumed by Barclays was --

15 A. Yes.

16 Q. -- compared to the estimate? And did the surprise cause  
17 you to take any further action or look into anything else?

18 A. It -- I think this is all -- this was all post-BAPCPA  
19 where you have 90 days -- sorry, you had 210 days to assume or  
20 assign. And so I think I knew going in that there could be  
21 seven months to determine whether or not the buyer chose to  
22 take on the contract and have the estate cured and have it  
23 assigned across to them. So I -- knowing that there was 210  
24 days in there, I may not have fully understood quite what the  
25 60-day batch of contracts was and how that fit into the 210

1 days, but I would have known from a legal perspective that they  
2 really had seven months to figure out whether to assume or  
3 assign and cure, and hence we wouldn't know until the end of  
4 seven months what the real number was.

5 Q. Okay. And did you discuss with each of them how they kind  
6 of went about coming up with this -- the estimate, the  
7 transaction adjustment for cure?

8 MR. GAFFEY: Objection to form of the question.

9 A. I don't know if I actually ever asked that question, but I  
10 would have assumed that -- and I did assume at the time that  
11 they knew what contracts Lehman was -- had signed and was  
12 responsible for and that they had analyzed that universe of  
13 contracts and attempted to figure out what, if anything, was  
14 owed by Lehman.

15 Q. So I mean, you mentioned BarCap, you don't have any  
16 knowledge of anyone from Barclays at the time, pre-sale, being  
17 involved in this, do you?

18 A. Pre-sale, no.

19 Q. But in the pre-closing days you're not aware of any  
20 involvement by anyone from Barclays in that estimated process,  
21 is that correct?

22 A. I'm not, but I'd be surprised if someone from Barclays  
23 hadn't taken a look at that and got comfortable that was a -- a  
24 solid number.

25 Q. Well, what --

1 A. I mean, if I was Barclays I'd want that number to be as  
2 high as possible.

3 Q. Well, did you have -- did you have any discussions with  
4 Barclays about any involvement in estimating that number?

5 A. No.

6 Q. And just to be clear, you're not aware that anyone from  
7 Barclays was involved in coming up with that estimate?

8 A. No.

9 Q. Are the -- the transaction adjustment of 1,645, on the  
10 left you have these amounts in the columns, 831, 917, do you  
11 see those? 701 --

12 A. Yes.

13 Q. What is your understanding of what those would be and why  
14 they would be entries by a transaction adjustment.

15 MR. GAFFEY: Objection to form of question and  
16 foundation.

17 A. What would be typically in a balance sheet is that the  
18 balance sheet would include an amount for accounts payable.  
19 Those are amounts due to third parties for the provision of  
20 goods and services that haven't been paid for as of the date of  
21 that balance sheet. It's not typical in a going-concern  
22 balance sheet to have anything included there for cure payment,  
23 for instance.

24 So I would have read "cure payment/accounts payable" to  
25 mean that in the case of these two estimated period end balance

1 sheets these first two columns, 831 and 917, that that relates  
2 to an accounts payable balance and that the cure payments  
3 description applies to the transaction adjustment amount that's  
4 further into the spreadsheet.

5 And I would have also known from experience that  
6 companies, unless they've had quite a lot of time after the  
7 date of a close for a balance sheet, find it very difficult to  
8 estimate what their accruals and liabilities are because often  
9 those amounts aren't known until a vendor sends an invoice at,  
10 let's say, the end of the month. And here we have a stub  
11 period that ends at the -- on the 17th. It's even more  
12 difficult because you may end up having to apportion an invoice  
13 that is for a longer period.

14 Q. Let me show you the document we'll mark as 585A. Do you  
15 recognize this chain involving yourself and others on September  
16 22, 2008?

17 (BCI Exhibit 585A, e-mail chain dated September 22, 2008  
18 involving Mr. Schwaba, was hereby marked for identification as  
19 of this date)

20 A. I don't remember this specific e-mail but I recognize  
21 these names, with the exception of Brent Bellengra (ph.).

22 Q. The original entire e-mail from Marie Stewart -- who is  
23 Marie Stewart?

24 A. I think she was SEC reporting for Lehman and then moved  
25 across to BarCap.

1 Q. Her e-mail, Subject: "David Coles of A&M needs to talk to  
2 you at 4 p.m. today about GL structure", et cetera. "He wants  
3 to get a handle on reporting for MainCo and what Barclays' need  
4 to" -- Is that consistent with your recollection of some of  
5 what you're trying to get a handle on, what assets and  
6 liabilities had gone over and what assets and liabilities  
7 remained with Lehman that you were going to be responsible for?

8 A. Yes.

9 Q. And on the top of that Kristie Wong writes, "Just spoke to  
10 him. He just wants to be in the loop on how we are segregating  
11 assets being sold to Barclays from the rest." But what does  
12 that mean "how we're segregating assets"?

13 A. It's typical for a company to run a trial balance for a  
14 general ledger account structure, and knowing that the --  
15 knowing now that Barclays purchased the infrastructure I wanted  
16 to make sure that it was capable of continuing to maintain and  
17 report to us a statement of its assets, liabilities, the P&L  
18 and the cash flow going forward because we were very reliant on  
19 Barclays because all of that backbone, if you will, went across  
20 to Barclays as a part of the transaction, yet we were  
21 responsible for a significant number of assets and value of  
22 assets and needed to be able to first understand what we were  
23 responsible for and then slowly monetize those assets.

24 Q. And did you have further regular correspondence or  
25 communications with Kristie Wong in this time period?



1 A. Yes.

2 MR. GAFFEY: Objection to the form of the question.

3 Q. The people you were interacting with at Lehman, whether  
4 they stayed at Lehman or went over to BarCap -- Barclays, were  
5 they cooperative in providing you information?

6 A. Four out of ten.

7 Q. Is that good or bad in your experiences?

8 A. It was pretty bad, but we all recognized that they had  
9 probably put in some really long days in the -- right up to the  
10 filing and right after the filing and that their employer had  
11 changed. For those people that had moved across to BarCap they  
12 were now employed by BarCap, and although they were obligated,  
13 or BarCap was obligated, to provide transitional services, we  
14 were probably going to be deemphasized as a priority. So it  
15 was necessary for us to continue to chase things so that we got  
16 some attention.

17 Q. So you had to do more chasing and asking than you would  
18 have like to. Was there ever a point in time when they flat  
19 out refused to give you something you needed?

20 A. No.

21 Q. My question to you is do you recall attending a meeting on  
22 or about September 29, 2008 with folks from Alvarez, Weil,  
23 Gotshal and a couple of Lehman or former Lehman executives,  
24 Paolo Tonucci and Alex Kirk, to discuss the details of the  
25 Barclays transaction?

1 A. I recall a meeting with those times and place. Whether I  
2 was at this one on the 29th I'm not sure. Paolo was a  
3 difficult person to track down.

4 Q. And you have no reason to -- if others recall that you  
5 were there you have no reason to doubt that you were at this  
6 meeting?

7 A. Correct.

8 Q. And do you recall the purpose of the meeting?

9 A. No.

10 Q. And looking at page 4889 do you recall at this meeting,  
11 which you may or may not have been at, which may or may not  
12 have been led by Mr. Fogarty, do you recall there being a flip  
13 sheet resembling the chart at the top of 4889?

14 A. I don't.

15 Q. Do you recall generally that Barclays put, paid, or was to  
16 give forty-five billion dollars in cash in return for getting  
17 securities that were marked at roughly in the 49.7 billion  
18 dollar range?

19 MR. GAFFEY: Objection to form.

20 A. Generally, yes.

21 Q. Do you know, you've probably discussed with the company  
22 during this period of time, during that week of September 15th  
23 after the bankruptcy filing, do you know whether the marks on  
24 the company's securities were being updated daily?

25 MR. GAFFEY: Objection to form. Foundation.

1 A. I don't remember.

2 Q. Looking on 4889 is there a -- almost near the bottom  
3 there's a note there where it says "Paid 38", that's 38  
4 billion, "cash to buy 42.9 billion Lehman assets". It says  
5 "value different valuation 5.1", and then under 32.9 billion it  
6 says "38", which would be 38 billion. Do you recall at this  
7 meeting there being a discussion of a difference in valuation,  
8 or a question of valuation, proper valuation, for the assets  
9 that came over through Barclays?

10 MR. GAFFEY: Objection to the form of the question --

11 A. I --

12 MR. GAFFEY: -- and the foundation.

13 A. I think I do recall being aware of that difference in  
14 valuation. Whether I became aware of it at this point in time,  
15 I'm not sure. I liken some of this a little bit to that scene  
16 in Close Encounters where the lights are flashing up on the  
17 board, and you can see what the lights are flashing, but you've  
18 got no idea what it really means.

19 Q. At some point did you have an understanding that the  
20 valuation difference arose because when securities that were  
21 marked as about forty-three billion dollars were transferred to  
22 Barclays, Barclays filtered them and said this isn't worth  
23 forty-three billion dollars. We think it's worth more like  
24 thirty-eight billion dollars.

25 MR. GAFFEY: Objection to the form of the question.

1 A. You're educating me at this point.

2 Q. What do you recall the difference between the forty-three  
3 billion number and the thirty-eight billion dollar number and  
4 the five billion dollar valuation difference?

5 MR. GAFFEY: Objection to the form of the question.

6 A. Very little other than that difference being five  
7 billion --

8 Q. Do you recall --

9 A. -- to marks.

10 Q. Do you recall attending a presentation to the creditors'  
11 committee on October 8th that concluded with a description of  
12 that difference?

13 A. No, but if that -- that was probably our first creditor  
14 committee meeting, and I certainly attended that and presented.  
15 That could well have been the number.

16 Q. And turning the page to 4891, and, under assets, do you  
17 see where it says thirty-eight billion and then the five  
18 billion --

19 A. Yes.

20 Q. -- and the forty-three billion? Does that refresh your  
21 recollection of the description of that difference at this  
22 meeting?

23 MR. GAFFEY: Objection to the form of the question.

24 A. No. It doesn't describe the difference. It just restates  
25 it.

1 Q. Does the fact that the five billion dollar difference is  
2 included in this manner, does that, maybe, refresh your  
3 recollection as to the nature of the five billion dollar  
4 difference other than it weights the marks and the difference  
5 in valuation?

6 A. That isn't what it says.

7 Q. Yet on the required page it refers to the different  
8 valuation and it's referring to Lehman assets, correct?

9 A. So are you now asking me to interpret these notes? Is  
10 that what the question is?

11 Q. The question is clear.

12 MR. GAFFEY: Objection to form and foundation.

13 A. I think I said I remember the five billion number. It was  
14 to do with marks, and I'm not sure that I learned that at this  
15 meeting, if, indeed, I was at this meeting.

16 Q. Look me go and ask you to turn to an exhibit previously  
17 marked as 461-A. It's entitled "Lehman Brothers Holdings Inc.  
18 Report to Unsecured Creditors' Committee October 8, 2008". On  
19 the second page you're listed as, apparently, someone  
20 responsible for a presentation on significant transactions.

21 A. Yes.

22 Q. Do you recognize this document?

23 A. Yes.

24 Q. Is this part of the presentation that Alvarez gave to the  
25 creditors' committee?

1 A. Yes.

2 Q. Did you help prepare this written presentation?

3 A. Yes.

4 Q. Did you help present the presentation?

5 A. Yes.

6 Q. And can you tell me, if you would turn to page 4531, did  
7 you help prepare or contribute to the content on page 4531?

8 A. No.

9 Q. Were you there when this was presented to the creditors'  
10 committee?

11 A. Yes.

12 Q. Under "Asset Purchase" do you see where it says "43.1  
13 billion repo assets, book value for Lehman stale marks,  
14 negotiated a 5 billion dollar reduction"?

15 A. Yes.

16 Q. Does that refresh your recollection as to the five billion  
17 dollar difference between the forty-three billion and thirty-  
18 eight billion relating to an issue concerning whether the  
19 Lehman marks were stale?

20 MR. GAFFEY: Objection to form.

21 A. Well, this page might have been my first actual  
22 understanding of how that five billion fit into the  
23 transaction.

24 Q. The five billion that's referred to in the notes on the  
25 meeting with Weil and former Lehman employees Kirk and Tonucci

1 on or about September 29th, do you know what -- do you have any  
2 recollection of whether that was explained to you, the five  
3 billion dollars, at the time and what was said about that?

4 MR. GAFFEY: Objection to the form of the question.  
5 Foundation.

6 A. I remember certainly marks was used. I'm seeing stale  
7 marks here. I think that's Jim quoting from that meeting, and  
8 it's stale in inverted commas.

9 Q. And looking at these other documents, does it refresh your  
10 recollection at all about their discussion at the meeting with  
11 Kirk and Tonucci and Weil about this five billion dollar  
12 valuation issue or difference.

13 MR. GAFFEY: Objection to the form of the question.

14 A. And it's -- it's bringing back some memories, yes.

15 Q. Can you just describe what it was that was explained to  
16 you at the meeting with Kirk and Tonucci?

17 A. I don't remember that.

18 Q. Well, what were the memories it was bringing back?

19 A. I remember the marks. I remember the word stale. I  
20 remember five billion.

21 Q. Is it fair to say that at the time you had either  
22 understood or were asking --

23 MR. GAFFEY: Objection to form.

24 A. I don't think I knew what it meant. I was starting at  
25 flashing lights.

1 Q. Well, again, do you recall -- you don't recall the  
2 description of it given to you in the Kirk, Tonucci and Weil  
3 meeting on or about the 29th of September?

4 A. I recall stale marks, five billion.

5 Q. When you understood that there was this valuation  
6 difference or issue with respect to Lehman's marks on certain  
7 securities that had been transferred to Barclays, did it  
8 surprise you or cause you any concern or cause you to take any  
9 follow-up action?

10 MR. GAFFEY: Objection to form.

11 A. No. It didn't. It didn't surprise me, because I didn't  
12 know what it meant.

13 Q. Do you recall what it meant at the time or do you have any  
14 recollection of not knowing what it meant?

15 A. I --

16 MR. GAFFEY: Objection to form.

17 A. I didn't -- I didn't focus enormously on it. I was  
18 comforted that Jim Fogarty was hunting this stuff down.

19 Q. And based upon your understanding of the conditions at  
20 Lehman the week of September 15th, would it surprise you if  
21 Lehman's marks by the end of that week were stale and not  
22 updated or accurate?

23 MR. GAFFEY: Objection to the form of the question and  
24 lack of foundation.

25 A. I wouldn't have had a basis for it and including



1 determination.

2 Q. Do you recall at the meeting with Kirk and Tonucci and  
3 Weil whether someone from Alvarez asked about the five billion  
4 dollar difference or whether it was volunteered by Kirk or  
5 Tonucci?

6 MR. GAFFEY: Objection to form.

7 Q. Do you have any basis or reason to believe that anyone  
8 working for Lehman or Barclays did anything improper or acted  
9 in bad faith in connection with this transaction?

10 MR. GAFFEY: Objection to the form and foundation.

11 A. I don't, but I have seen many times when a company is  
12 being purchased and there is an estate that has certain assets,  
13 and those individuals representing the estate are assumed to be  
14 employees of the purchaser. Those employees are in a  
15 conflicted situation, and those employees would have to have  
16 very robust integrity to be switching hands and yet  
17 representing the estate in the process of switching hands over  
18 to the new employee. It's a tough position to put employees  
19 in.

20 Q. In employment commonly occurs out of necessity?

21 A. It -- yes.

22 Q. And were you aware that Lehman employees involved in  
23 negotiating the deal were also, at the same time, negotiating  
24 employment agreements with Barclays?

25 A. Only after the fact.

1 Q. Putting aside that potential for conflict, you're not  
2 aware of any evidence of anyone acting in bad faith in  
3 connection with the sales transaction. Is that correct?

4 MR. GAFFEY: Objection to form and foundation.

5 A. I'm not aware of anything in particular there.

6 (End playing of video deposition testimony of David Coles)

7 THE COURT: That's the end of the Coles deposition.  
8 We're going to take a ten minute break.

9 I want to just provide notice to counsel that Mr.  
10 Coles appeared this summer as a live witness in a litigation  
11 within the Finlay bankruptcy case. And so he is a witness  
12 familiar to me. And none of his testimony related in any way  
13 to any of the issues that are presently before the Court. But  
14 he testified in his capacity as an executive of Finlay  
15 enterprises.

16 We'll adjourn for ten minutes.

17 (Recess from 4:08 p.m. until 4:22 p.m.)

18 THE COURT: Be seated, please.

19 MR. TAMBE: Good afternoon, Your Honor. Jay Tambe  
20 from Jones Day for Lehman Brothers Holdings. The movants will  
21 call their next witness, Mr. Joseph Schwaba. And that's a  
22 slight change, I believe, from the schedule you have.

23 THE COURT: Oh, that's a surprise. I was expecting  
24 Mr. Slattery.

25 MR. TAMBE: And the only reason for the change is the

1 following is the change in the schedule, Your Honor, given the  
2 time that we have today versus the time that's now available  
3 tomorrow.

4 THE COURT: That's fine.

5 MR. TAMBE: Mr. Schwaba?

6 THE COURT: I take it this is acceptable to Barclays.

7 MR. HUME: Yes, Your Honor.

8 THE COURT: Mr. Schwaba, please raise your right hand.

9 (Witness sworn)

10 THE COURT: Be seated, please.

11 DIRECT EXAMINATION

12 BY MR. TAMBE:

13 Q. Good afternoon, Mr. Schwaba.

14 A. Good afternoon.

15 Q. Could you please describe for the Court your educational  
16 background?

17 A. Yes. I'm a graduate of the University of Notre Dame,  
18 1967. I -- after that, I went into the United States Marine  
19 Corp as an officer for three years, tour of duty in Vietnam. I  
20 was released honorably in 1970. And I went -- enrolled in  
21 Northwestern University's graduate school of management where I  
22 got an MBA in finance in 1972 -- MBA in finance in 1972.

23 Q. Okay. Is that graduate school the school that's now  
24 referred to as Kellogg?

25 A. That is correct.

1 Q. Can you briefly give us an overview of your work  
2 experience? And in particular, focus on the experience that  
3 you have as it relates to the work you've done in this case.

4 A. Certainly. I have over thirty-five years experience in  
5 the fixed income and municipal markets. I've been active as a  
6 trader, a hedger, a risk manager, asset liability management.  
7 I've held various positions in institutions both on a  
8 consulting and senior management basis. In all these  
9 activities, I've focused on valuation in many respects and  
10 specifically, discounted cash flow and a comparables analysis  
11 as I did in this case.

12 Q. Okay. So through the course of your thirty-five year  
13 career, you have used many of the same valuation techniques  
14 that you've used on this assignment?

15 A. That is correct.

16 Q. And let's go through some of your specific prior work  
17 experiences. And if you could start back in time with your  
18 first position when you left Kellogg.

19 A. Well, when I left Kellogg, I went to work for an  
20 investment banking firm and actually started using discounted  
21 cash flow there. In terms of relevant experience, I would  
22 characterize my stint at A.G. Becker in 1977 through '82 where  
23 I focused on practicing valuation techniques in the context of  
24 both trading strategies and hedging the firm's position in the  
25 fixed income markets in terms of both fixed rate and floating

1 rate. And I used both discounted cash flow and comparables  
2 analysis there.

3 That was followed, in 1986, at Prudential-Bache  
4 Securities, again, where I was engaged in both proprietary  
5 trading and strategy design working with different trading  
6 desks and institutional clients. And again, I used discounted  
7 cash flow and comparables analysis as I did in this case.

8 Q. AT both A.G. Becker and Prudential, did the fixed income  
9 securities that you dealt with include municipal securities?

10 A. That's correct.

11 Q. Okay. I'm going to hand up a binder which has a copy of  
12 your resume and we can go through the rest of your work with  
13 the help of that binder. Just give me one moment.

14 A. Sure.

15 MR. TAMBE: Your Honor, may I approach?

16 THE COURT: Yes. Thank you.

17 THE WITNESS: Thank you.

18 Q. If you could, Mr. Schwaba, please turn in that binder to  
19 the tab 1A. So it's -- there's a 1A. Do you have it? And  
20 that's Movants' Trial Exhibit 154A.

21 A. Yes.

22 Q. Could you describe for the Court what that document is?

23 A. That is my curriculum vitae.

24 Q. Okay. And does this list the various places that you've  
25 been employed starting in '86 to the present?

1 A. Let's see. Yes, it does.

2 Q. Okay. And it also lists your education, your military  
3 service as well as professional registrations and memberships,  
4 correct?

5 A. That is correct.

6 Q. Okay. Now focusing on --

7 MR. TAMBE: Your Honor, we move Movants' Trial Exhibit  
8 154A into evidence.

9 MR. HUME: No objection.

10 (Movants' Trial Exhibit 154A, curriculum vitae of Joseph  
11 Schwaba, was hereby received into evidence as of this date.)

12 Q. Mr. Schwaba, going to page 3 of your curriculum vitae,  
13 there's a --

14 MR. TAMBE: The next page, please.

15 Q. -- there's an employer listed there, Bank of America,  
16 formerly Continental Bank. Could you describe for the Court  
17 what you did at Continental Bank between 1986 and 1990?

18 A. Yes. I had two main functions. One was to enter the U.S.  
19 primary dealership. Basically, I managed a number of trading  
20 desks in the U.S. government securities trading and government  
21 agencies trading and included municipals as well. The -- I  
22 also set up a global swap options trading business which also  
23 had fixed income associated with it. And that was a very  
24 successful business. In both of these main activities made  
25 extensive use of discounted cash flow and comparables analysis

1 as well.

2 Q. Now your time at Bank of America/Continental Bank in this  
3 time period, '86 to '90, the 1987 stock market crash happened  
4 while you were there.

5 A. Yes, it did.

6 Q. Did you have any special responsibilities or duties  
7 related to dealing with the crash, the aftermath of the crash,  
8 while at this employer?

9 A. Yes. I was very involved in that in terms of managing  
10 various types of positions. And one position in particular was  
11 municipal bond positions that I was managing to liquidate in an  
12 orderly fashion during that period of time.

13 Q. Okay. Moving on forward in time, where did you go to work  
14 next?

15 A. After Bank of America, I started my own firm, Schwaba &  
16 Associated, a consulting firm. And during that period of time,  
17 the most relevant experience I had was setting up my own global  
18 risk analysis software and -- which focused on fixed and  
19 floating rate securities and, particularly, discounted cash  
20 flow analysis.

21 Q. Was this a valuation software?

22 A. It was valuation software and I also trained my clients'  
23 employees in the use of this software.

24 Q. And the clients that you had developed the software for  
25 and the employees that you trained, was this a global banking

1 institution?

2 A. It was a Swiss banking institution.

3 Q. Where did you go to work next after Schwaba & Associates?

4 A. After that, I went to work for ABN AMRO North America.

5 They had actually been a client of mine on a consulting basis.

6 And they asked that I come on board. There were two functions.

7 One was to joint a multi-institution task force in setting up

8 improved margining and credit capability between and among

9 major banks that were trading with each other. The second

10 function was to work with various fund managers and/or trading

11 desks at ABN AMRO and advise them on strategy development.

12 Q. Now, after you left ABN AMRO, did you go back to Schwaba &  
13 Associates?

14 A. Yes, I did, and engaged in a number of investment banking  
15 activities. One relevant experience, in particular, was  
16 working with an online broker that was setting up a new  
17 technology oriented company that took advantage of extensive  
18 amounts of software to go online and advertise and execute  
19 services in terms of fixed income and made --

20 Q. You may want to keep the microphone a little bit closer --

21 A. -- and made extensive use of both discounted cash flow and  
22 comparable analysis as I do in this case.

23 Q. Moving forward to the time period of 2003 through 2009,  
24 which I guess includes the financial crisis of 2008 --

25 A. Yes.



1 Q. -- where were you employed during that time period?

2 A. I went to work for Federal Home Loan Bank of Pittsburgh.

3 And my -- I had two main duties there, generally speaking.

4 One, I came on board as a senior officer at the bank, was  
5 active in the asset liability management committee which had  
6 primary -- responsible for managing the bank's assets and  
7 liabilities on an ongoing basis. Formerly, also along with  
8 that, I was actually manager of market risk for the bank, had a  
9 staff under me and I was responsible for managing the positions  
10 on an ongoing basis for the bank. During that period of time,  
11 I successfully oversaw the transition to a more complete up to  
12 date asset liability modeling system and was, again, a voting  
13 member of the bank's asset liability committee.

14 Q. In your positions at the Federal Home Loan Bank of  
15 Pittsburgh, did you have occasion to value and risk manage  
16 municipal securities?

17 A. Yes, we did.

18 Q. Just orders of magnitude, can you give a sense of how  
19 large the overall portfolio was, the assets that were being  
20 managed by or being held by the Federal Home Loan Bank of  
21 Pittsburgh?

22 A. As of December 2008, I think the total assets were about  
23 ninety billion.

24 Q. And how much of that was municipal securities?

25 A. Approximately 585 million.

1 Q. Okay. And in the course of valuing and risk managing  
2 those positions, were you making any trading decisions  
3 instructing people to buy or sell securities?

4 A. In my capacity in the asset liability management  
5 committee, it was an ongoing basis to manage the positions,  
6 monitor the positions and determine on an ongoing basis the  
7 value.

8 Q. Taking a step back from some of your specific employments,  
9 when you from time to time had to value or risk manage  
10 municipal securities over the course of your career, what types  
11 of information sources have you typically used to get  
12 information about prices in that sector?

13 A. Typically, Bloomberg and MSRB which is Municipal  
14 Securities Rulemaking Board.

15 Q. Now, MSRB data, is that something you used in this case?

16 A. Yes.

17 Q. And what is MSRB data?

18 A. That is a traded data under the auspices of the MSRB which  
19 is the federal regulator of markets and trading municipal  
20 bonds. All dealers and trading houses report their trades to  
21 the MSRB within fifteen minutes of transaction.

22 Q. So it's actual market transaction data.

23 A. Actual market transactions.

24 Q. Okay. Just taking your attention back to your CV, Exhibit  
25 154A, the last page there which lists your professional

1 registrations and professional memberships, I assume those are  
2 memberships and registrations you had while you were actively  
3 working for financial institutions, is that correct?

4 A. That is correct.

5 Q. Are those active registrations and memberships --

6 A. They are not active now, no.

7 Q. But while you were working in the financial sector  
8 actively for banks, you had Series 3, Series 7, Series 63  
9 registrations, is that correct?

10 A. That is correct.

11 Q. And you have the various professional memberships that are  
12 listed on that page, correct?

13 A. That's correct.

14 Q. Okay. Before we get to your opinions, just in terms of  
15 the methodologies that you have employed and the relationship  
16 between your methodologies and your prior work experience,  
17 you've talked a couple of times now about discounted cash flow  
18 and comparables. Could you please describe for the Court in  
19 terms of your prior work experience and your application here  
20 what's the DCF, or discounted cash flow, methodology?

21 A. Sure. Discounted cash flow is a means of valuing bonds or  
22 determining bond payments and then discounting those typically  
23 at a level that's above the risk free rate based on market  
24 risk.

25 Comparables analysis is a method for valuing municipal

1 bonds by comparing relevant and similar bonds in order to  
2 arrive at a market-based valuation. Criteria are involved in  
3 that.

4 Q. And what are those criteria?

5 A. Criteria typically -- are maturity, credit rating,  
6 geographic location, types of bonds and revenue sources.

7 Q. And are those the criteria that you used in valuing the  
8 municipal bonds at issue here?

9 A. That is correct.

10 Q. Now, I know there's been some discussion in motion papers  
11 and the like about failed auction-rate securities.

12 A. Yes.

13 Q. Did you include in any kind of follow-on analysis a review  
14 of failed auction-rate securities and the effect that has on  
15 your comparables analysis?

16 A. I did.

17 Q. And what did that follow-on analysis show you?

18 A. It showed that auction-rate securities that had failed  
19 actually traded at par on September 19th, 2008.

20 Q. So when you included in your analysis, your comparability  
21 analysis, this factor of failed auction-rate securities, did  
22 that significant affect any of your opinions that you reached  
23 in this case?

24 A. You mean, in my init --

25 Q. Did it affect your initial opinions in any way?

1 A. No, it did not.

2 Q. Okay. Did you make any minor adjustments to your initial  
3 opinions?

4 A. Yes. I did make some minor adjustments.

5 Q. Okay. And can you give the Court some indication of the  
6 magnitude of those adjustments?

7 A. The magnitude of the adjustments was less than -- about  
8 180,000 in terms of undervaluation differences.

9 Q. And in terms of the overall size of the positions that you  
10 were valuing, what was the total dollar amount of the positions  
11 that you were valuing?

12 A. 341 million approximately.

13 MR. TAMBE: Your Honor, we tender Mr. Schwaba as an  
14 expert in the valuation of municipal securities.

15 MR. HUME: No objection, Your Honor.

16 THE COURT: He's accepted as an expert in that area.

17 MR. TAMBE: Thank you, Your Honor.

18 Q. Mr. Schwaba, if we could turn in the binder that's before  
19 you to tab 1B, B as in boy. Are you there, sir? And it's  
20 Movants' Exhibit 154B. Are you there, sir?

21 A. I'm --

22 Q. Do you have the document --

23 A. Yes, I have it.

24 Q. Okay.

25 A. 154B. Got it.

1 Q. Right. Could you describe for the Court what this  
2 document is, please?

3 A. Yes. This is an expert report that I compiled --

4 Q. It says at the bottom of the first page of this report,  
5 "Corrected version, September 27, 2010". Do you see that?

6 A. Yes, I do.

7 Q. Okay. Could you describe generally for the Court the  
8 nature of the changes that were made to your original expert  
9 report?

10 A. Yes. There were two changes. There was an errata which  
11 was a relatively minor amount and then a -- subsequent to my  
12 declaration, I changed that I talked about a little bit before.

13 Q. So let's take each of those in turn. First, let's just --  
14 dealing with Exhibit M154B, your corrected expert report, do  
15 you know whether a copy of that's been provided to Barclays?

16 A. I believe it has.

17 Q. You mentioned an errata. If you could turn in your binder  
18 to tab 2, which is Movants' Trial Exhibit 918. Do you have tab  
19 2 there, sir?

20 A. Yes. I think I do here.

21 (Pause)

22 A. I'm sorry.

23 Q. It's on the screen as well. It's just a question of  
24 identifying. Is that the errata sheet that you were  
25 referring --

1 A. Yes --

2 Q. -- to, sir?

3 A. -- that is.

4 Q. And so this is an errata sheet that you prepared soon  
5 after you prepared your expert report?

6 A. That is correct.

7 Q. And the updated or corrected expert report, M154B includes  
8 these changes that are reflected?

9 A. That is correct.

10 Q. Okay. And you have reviewed your expert report before  
11 testifying here today?

12 A. Yes, sir.

13 Q. Okay. And would you adopt the statements and the  
14 conclusions in your expert report as your testimony on the  
15 stand?

16 A. I would.

17 MR. TAMBE: Your Honor, we offer Movants' 154B in  
18 evidence.

19 MR. HUME: No objection, Your Honor, although maybe  
20 it's an objection. I think for completeness you ought to have  
21 both.

22 MR. TAMBE: The original as well as --

23 MR. HUME: I would think so, so we can see the  
24 changes.

25 THE COURT: What are you objecting to?

1 MR. HUME: For completeness, I would think we would  
2 want the original report and the corrected report.

3 THE COURT: Okay. Any problem with that?

4 MR. TAMBE: We have no objection, Your Honor. It's  
5 Movants' Trial Exhibit 154 is the original report. Happy to  
6 offer that in evidence as well.

7 MR. HUME: No objection.

8 THE COURT: Then it's admitted both in its original  
9 and the amended form.

10 (Movants' Trial Exhibit 154 and 154B, Joseph Schwaba's expert  
11 report in both its original and amended form, was hereby  
12 received into evidence as of this date.)

13 BY MR. TAMBE:

14 Q. Now, Mr. Schwaba, if you could turn to tab 3 of the binder  
15 before you, please. Are you there, sir?

16 A. Yes, I am.

17 Q. Could you describe for the Court what this document is?

18 A. Yes. This is the declaration.

19 Q. And for what purpose did you prepare this declaration?

20 A. I prepared this declaration to adapt the amended analysis  
21 that I had made with regard to failed auction-rate securities.

22 Q. Okay. Did you also in this declaration address some of  
23 the criticisms that have been leveled against you by Barclays?

24 A. Yes. I responded to Barclays questions and any questions  
25 that I just talked about.



1 Q. And you have reviewed this declaration before today?

2 A. That is correct.

3 Q. And would you adopt as your testimony today the statements  
4 set forth in this declaration?

5 A. Yes, I would.

6 Q. Your Honor, we often Movants' Trial Exhibit 825 in  
7 evidence.

8 MR. HUME: No objection.

9 THE COURT: It's admitted.

10 (Movants' Trial Exhibit 825, declaration of Joseph Schwaba, was  
11 hereby received into evidence as of this date.)

12 Q. Mr. Schwaba, in preparation for your testimony here today,  
13 did you prepare some small number of demonstrative slides?

14 A. Yes, I did.

15 MR. TAMBE: Your Honor, may I approach?

16 THE COURT: Yes. Thank you.

17 Q. Before we get to the slides, if you could start by  
18 describing for the Court the particular securities that you  
19 valued. I understand you valued about twenty-six CUSIPs or  
20 twenty-six separate securities. So how did that collection of  
21 securities get them together?

22 A. Navigant experts had determined a threshold of a million  
23 dollars or greater than a million dollars between Barclays and  
24 Bank of New York custodian. That addressed nineteen out of  
25 twenty-six. There were seven other securities that I had --

1 were valued by Barclays at a tenth of a penny. And to me, that  
2 seemed facially incorrect.

3 Q. So of the twenty-six securities, if I understood your  
4 testimony, nineteen were ones where there was a delta of a  
5 million dollars or more between Barclays' valuation and the  
6 Bank of New York's valuation --

7 A. That's correct.

8 Q. -- plus or minus.

9 A. Yes.

10 Q. And the other seven, you said, were ones which were valued  
11 at one-tenth of one cent --

12 A. That's right.

13 Q. -- by Barclays.

14 A. Yes, sir.

15 Q. Okay. And then again, in broad strokes, with respect to  
16 that collection of securities, could you describe what tools or  
17 methodologies you used to value those securities?

18 A. I'm sorry. Say the question again.

19 Q. Yes. With respect to those twenty-six securities, what  
20 tools or methodologies generally did you use to value those?

21 A. Well, I used a combination of both discount cash flow and  
22 comparables analysis.

23 Q. And as we go through the various securities or groups of  
24 securities that you valued, I might ask you some questions  
25 about where you applied discounted cash flow --

1 A. Sure.

2 Q. -- versus comparables. Just starting with the top line in  
3 terms of what the overall valuation difference is between the  
4 values that you arrived at and the values ascribed by Barclays,  
5 is that what is set out on slide 3 of your presentation  
6 materials?

7 A. That is correct.

8 Q. And that's about 150 million dollar difference, is that  
9 right?

10 A. Yes, sir.

11 Q. Now, did you do any analysis to see how that's broken out?  
12 You said there were some securities that were valued at one-  
13 tenth of one penny. Did you categorize and break out this 150  
14 million dollar difference in any way?

15 A. Yes, I did. I broke it out in three categories.

16 Q. Okay. And is that set out in your presentation materials?

17 A. Yes, it is.

18 Q. Turning to slide 5, is that the breakout of 150 -- roughly  
19 150 million dollars across three categories?

20 A. That is correct.

21 Q. And could you describe for the Court what those three  
22 categories are?

23 A. Yes. The first category is the tenth of a penny valuation  
24 by Barclays on seven CUSIPs. That was for a difference of  
25 107.8 million which is seventy-two percent of the total. The

1 second category is a twenty percent discount that Barclays  
2 applied applying to fifteen of those CUSIPs worth a difference  
3 of approximately thirty-eight million dollars. And then the  
4 third category -- there were three zero coupon bonds and one  
5 fixed rate bond, four bonds altogether CUSIPs, for four million  
6 dollars totaling a little under 150 million.

7 Q. Okay. The bonds that were valued by Barclays at one-tenth  
8 of one penny, could you briefly describe what kind of bonds  
9 were these?

10 A. Yes. There was one floating rate note, state of  
11 Massachusetts floating rate note. Second, there were five  
12 variable rate demand obligations, a form of adjustable rate  
13 security. And then one fixed rate bond.

14 Q. And you have those described in your materials as well?

15 A. I do.

16 Q. And is that on slide 6, the breakout of those seven bonds?

17 A. Let's see. I think -- yes, they are.

18 Q. Now, we won't go through every single one of these CUSIPs.  
19 But just in terms of methodology, taking the Massachusetts  
20 state floating rate note bond, that's one that's valued at, it  
21 looks like, 750 dollars by Barclays. You valued that at sixty-  
22 one million dollars. That's a delta of sixty-one million  
23 dollars roughly.

24 A. That is correct.

25 Q. How did you value that bond?

1 A. I applied this discounted cash flow methodology to that  
2 bond.

3 Q. And could you describe briefly how you went about doing  
4 that?

5 A. Yes. I constructed a yoke curve and applied it to all the  
6 bond payments of the Massachusetts, then took an OAS, or option  
7 adjustment spread, which I got from looking at the MSRB  
8 database, an equivalent state of Massachusetts -- there was an  
9 identical state of Massachusetts bond calculated in an option  
10 adjusted spread of that of fifteen basis points. I then went  
11 back and took the remaining twenty-nine years of bond payments  
12 and applied the discount rate that I had calculated and derived  
13 the price of 81.78 and a value of 61.3 million off of that.

14 Q. And in your presentation materials, do you have some  
15 information about the Massachusetts state floating rate note  
16 that you valued?

17 A. Yes, I do.

18 Q. Okay. And if we could just turn -- pardon me for the  
19 whiplash but, on slide 11, is that some information about the  
20 general Massachusetts state --

21 A. Yes.

22 Q. -- floating rate note that you just described?

23 A. It's a very high credit rating issued and backed by the  
24 state of Massachusetts. The general obligation bond has  
25 twenty-nine years of remaining expected payments. There's no

1 history to fault with this bond and as I said, it's backed by  
2 the state of Massachusetts' pledge to use all legally available  
3 resources, including tax revenues, to repay the bondholders.

4 It's a floating rate bond priced off LIBOR --

5 Q. Now --

6 A. -- on a quarterly basis.

7 Q. Now you've described your methodology of creating this  
8 discounted cash flow analysis and using an option adjusted  
9 spread, et cetera. What is your understanding of Barclays'  
10 methodology for valuing this bond, I think, at 750 dollars as  
11 opposed to sixty-one million dollars?

12 A. I don't know what their methodology is.

13 Q. Did you see any deposition testimony or exhibits that  
14 describe how it is that they had arrived at this value?

15 A. Sean Teague, in his deposition, described it, as I  
16 believe, an oversight.

17 Q. Now that was an application of a discounted cash flow  
18 methodology. I want to go back to the slide we were looking at  
19 which was the one-tenth of one penny bonds. Did you apply a  
20 comparables analysis to value any of these bonds?

21 A. Yes. The variable rate demand obligations.

22 Q. So again, using one of the VRDOs, variable rate demand  
23 obligations, as an example, could you describe to the Court how  
24 you went about using a comparables analysis to do your  
25 valuation?

1 A. Certainly. I went to the universe of traded securities at  
2 the MSRB on September 19th, 2008.

3 Q. How many trades were reported, actual transactions  
4 reported --

5 A. A single CUSIP basis, 12,416 trades.

6 Q. So on a CUSIP, on a per issue basis, there were 12,000  
7 issues that traded?

8 A. That's right.

9 Q. And there's more transactions than that? There were  
10 multiple transactions?

11 A. Right. Yes.

12 Q. Okay. What did you do next?

13 A. Well, I applied this criteria that I had talked about, the  
14 five criteria, and applied it to the universe of securities and  
15 selected five comparables that were -- had displayed those  
16 similar characteristics. And they were often the -- in one of  
17 the examples, for example, Pennsylvania and most others -- it's  
18 almost all others as well, they had the same issuer, the same  
19 type of bond and had other similar characteristics as well.

20 Q. So let's go to the example that you said. Those  
21 Pennsylvania example -- again, pardon me for the whiplash.  
22 Let's go to -- is that the bond you were talking about?

23 A. That is the bond I was just talking about.

24 Q. So describe for the Court, if you could, the comparables  
25 analysis with respect to this bond, again, valued by Barclays

1 at one-tenth of one penny, valued by you at par.

2 A. Yes. There were five criterion used to compare as I had  
3 indicated before: the maturity, the credit rating, the bond  
4 type, the revenue sources and geographic location. In this  
5 selection, all the comparables were from the same issuer, all  
6 the trans --

7 Q. What does that mean, from the same issuer? Exactly the  
8 same issuer, Pennsylvania State Turnpike --

9 A. That is correct, yes.

10 Q. So five other bonds issued by the same issuer traded on  
11 that day, September 19th?

12 A. That is correct, at par.

13 Q. And what did they trade at?

14 A. They traded at par.

15 Q. Again, and you applied par there for your valuation?

16 A. Yes. Again, the -- I took the average price of the  
17 selected similar bonds and the price was par.

18 Q. Again, do you have any explanation for Barclays'  
19 methodology, one-tenth of one penny at this point?

20 A. No, I don't.

21 Q. Moving to the next category. I think -- we had a category  
22 of one-tenth of one penny. The next category was the twenty  
23 percent discount. First of all, what do you mean by twenty  
24 percent discount?

25 A. Discount from par.



1 Q. So those were securities where the price applied to  
2 Barclays was twenty percent off?

3 A. That's right.

4 Q. Slide 8 -- does that summarize basically the valuation  
5 difference that's attributable to that twenty percent  
6 discounted set of bonds?

7 A. That is correct.

8 Q. And again, within this collection of fifteen securities,  
9 can you describe the different types of securities that are  
10 included in here?

11 A. Sure. There are five variable rate demand obligations,  
12 nine auction-rate securities and one hybrid adjustable bond.

13 Q. And could you describe for the Court what two of the  
14 methodologies you used to value these fifteen securities?

15 A. Yes. The comparables analysis, again, was used for the  
16 VRDOs. Likewise, the auction rates. And then the hybrid  
17 adjustables was discounted cash flow for that particular bond.

18 Q. Did you use exactly the same comparables analysis for  
19 these VRDOs as you used in your first category?

20 A. That's correct.

21 Q. And how would you decide whether to pick discounted cash  
22 flow or comparables? Why pick one or the other with respect to  
23 these bonds?

24 A. Well, for the VRDOs, as an example, they're reset -- their  
25 rates are reset on a very short term basis and it's very --

1 it's pretty formulaic as well. On the auction-rate securities,  
2 they also have a very short reset period and, of course, the  
3 rate is determined by the market so it doesn't limit -- those  
4 two categories do not lend themselves well to discounted cash  
5 flow.

6 Q. And again, in terms of application of your comparables  
7 analysis, you used your five criteria to select comparables  
8 from the securities that actually traded on the 19th, is that  
9 correct?

10 A. That is correct.

11 Q. Now, we had some discussion at the beginning about failed  
12 auction-rate securities. And you went and did some further  
13 analysis to determine the effect of failed auction-rate  
14 securities. Could you describe that analysis to the Court,  
15 please?

16 A. Yes. I looked at the analysis specifically on September  
17 19th and discovered that ninety-three failed auction-rate  
18 securities actually traded at par on September 19th.

19 Q. Now were there any securities, auction-rate securities,  
20 that had not experienced any failed auctions that also traded  
21 on that day?

22 A. That is correct. Roughly, sixty-four, I believe they  
23 were.

24 Q. Okay. So of those sixty-four securities, auction-rate  
25 securities, traded on the 19th, had not experienced a failure,

1 what did they trade at?

2 A. At par.

3 Q. Okay. And you said there were ninety-three securities,  
4 auction-rate securities, that traded on the 19th that had  
5 experience failed auctions and those traded at par as well,  
6 sir?

7 A. That is correct.

8 Q. If you could describe where auction -- municipal auction-  
9 rate securities fit into this world of adjustable municipal  
10 securities? And how do they work? What's different or similar  
11 about them?

12 A. Well, again, they're auction rate. They have a very short  
13 reset period which means they periodically auction it in the  
14 market based on investor interest in it. And if there's not  
15 enough interest in that at a so-called clearing rate, a maximum  
16 rate is set on those securities.

17 Q. Okay. Did you look to see what the maximum rate was for  
18 the auction-rate securities that were in this twenty-six CUSIPs  
19 that you valued?

20 A. Yes, I did.

21 Q. Okay. And what were the rates?

22 A. They ranged from -- I think the lowest was 11.78 percent  
23 to 18 percent.

24 Q. And that's the rate that would apply if you experienced  
25 failed auctions, is that right?

1 A. That's correct.

2 Q. Now the fact that an auction has failed, does that  
3 generally in this space mean that the issuer is in default of  
4 its obligations?

5 A. No, it does not.

6 Q. Interest is still being paid?

7 A. That's correct.

8 Q. Is it a reflection of that the credit is going to be  
9 downgraded because the auction has failed?

10 A. No.

11 Q. And is there any connection between the maximum rate and  
12 the likelihood that the auction-rate securities are actually  
13 going to be redeemed by the issuer?

14 A. There probably is a relationship there because the higher  
15 the maximum rate versus current market rates the more likely it  
16 is that the bond would be redeemed.

17 Q. Now, when you went back and did this analysis and looked  
18 at what had happened to failed auction-rate securities on the  
19 19th, you said I think at the beginning of your testimony there  
20 was a slight adjustment to your valuation, is that right?

21 A. That is correct.

22 Q. And what was the reason for that slight adjustment to your  
23 valuation?

24 A. There were -- I believe out of the nine auction-rate  
25 securities, there were two where there was a slight difference.

1 They had been under the previous price slightly above par. And  
2 again, that accounted for the -- I believe it was roughly  
3 182,000 in difference.

4 Q. Just going back to the comparables that you used, were  
5 there VRDO and other adjustable securities that actually traded  
6 in the market on the 19th that traded above par, sir?

7 A. Umm --

8 Q. In your sample size, the 12,000 issues.

9 A. Yeah. I believe there were.

10 Q. Just to finish off this category, we've talked about the  
11 VRDOs, the auction rates. How about the hybrid adjustable?  
12 Was that a discounted cash flow or was that a comparables  
13 analysis?

14 A. That would be a discounted cash flow.

15 Q. Now the last category you had talked about was four other  
16 CUSIPs. I believe you had a zero coupon bond and another type  
17 of bond. The zero coupon and a fixed rate bond.

18 A. There were three zero coupons and one fixed rate bond.

19 Q. And what methodology did you use to value those?

20 A. Discounted cash flow.

21 Q. And that was application of the discounted cash flow  
22 methodology the same way you described before?

23 A. That is correct.

24 Q. And does slide 10, sir, then summarize the valuations and  
25 the valuation differences between your valuations and Barclays'

1 valuations across these three categories of bonds?

2 A. Yes, sir.

3 MR. TAMBE: If I could just have a moment, Your Honor.

4 THE COURT: Sure.

5 (Pause)

6 MR. TAMBE: Thank you very much, Mr. Schwaba.

7 THE WITNESS: Yes, sir.

8 MR. HUME: May it please the Court, Hamish Hume from  
9 Boies Schiller & Flexner for Barclays.

10 CROSS-EXAMINATION

11 BY MR. HUME:

12 Q. Good to meet you, Mr. Schwaba. We haven't met before.

13 A. Yes, sir.

14 Q. Mr. Schwaba, am I correct that of the twenty-six municipal  
15 bonds that you valued, not a single one traded on September  
16 19th, 2008?

17 A. I'm not so sure that's true. The -- certainly for some of  
18 the bonds that was true.

19 Q. Okay. So just so it's clear, if I ask the question this  
20 way, to your knowledge, am I correct that you have no knowledge  
21 of any one of the twenty-six municipal bonds that you valued  
22 actually being purchased or sold on September 19th, 2008?

23 A. Yes.

24 Q. And am I correct that in your work in this case, you have  
25 not identified any entities that on September 19th, 2008 were

1 in the market to buy any one of those twenty-six municipal  
2 bonds?

3 A. I had not indentified entities. But they're -- clearly,  
4 trades were done under the -- in the context of the MSRB as  
5 traded securities.

6 Q. With respect to the twenty-six bonds you valued, am I  
7 correct that you did not identify any actual purchasers of  
8 those bonds on September 19th, 2008?

9 A. It's true I didn't identify, but that didn't mean that  
10 there weren't trades done.

11 Q. Did you perform any analysis, Mr. Schwaba, of the extent  
12 of trading activity in any one of those twenty-six bonds?

13 A. No. But I did do some analysis in terms of, again, trades  
14 that were happening. For example, Barclays itself priced four  
15 of these auction rate security bonds the same universe as the  
16 ninety-three securities at part on September 19th.

17 Q. Mr. Schwaba, my question is simply irrespective of how  
18 Barclays valued the securities, you don't have any analysis of  
19 how many if any of these securities were changing hands on or  
20 around September 19th, 2008?

21 A. Well, actually, I believe I do have a handle in terms that  
22 I know that ninety-three failed auction securities had traded  
23 hands. But it didn't apply to ours -- or mine, rather, but --  
24 and I had no direct knowledge. But I do know that trades were  
25 happening.

1 Q. The ninety-three that you referenced did not include any  
2 of the twenty-six that you valued, correct?

3 A. That's correct.

4 Q. And am I correct that if a person who owned one of these  
5 twenty-six municipal bonds wanted to sell them on September  
6 19th, 2008, there was no guarantee that they would be able to  
7 find a buyer?

8 A. There was no guarantee but that doesn't mean that they  
9 couldn't have found a buyer.

10 Q. All right. Is it true that in trying to sell a security  
11 for which there may or may not be a buyer, the seller might  
12 have to lower the price in order to get a buyer?

13 A. It's theoretically true.

14 Q. Okay. Have you ever personally had the experience, Mr.  
15 Schwaba, of trying to sell a municipal bond and learning that  
16 you cannot sell it for the price shown that day on your broker-  
17 dealer statement for the value for that bond? Have you ever  
18 had that experience?

19 A. Have I personally had that experience?

20 Q. Yes.

21 A. No. I have not personally had that experience.

22 Q. Have you had that experience in connection with any of the  
23 financial institutions you've worked with in which they have  
24 not been able to sell a municipal bond for the price shown on  
25 their daily statement from their broker-dealer?



1 A. I can't recall that happening.

2 Q. Am I correct that the comparables that you looked at, to  
3 the extent you used comparables analyses, were all municipal  
4 bonds that did transact and trade on September 19th, 2008?

5 A. That would be correct.

6 Q. And would you agree with me that municipal bonds that are  
7 transacting on September 19th, 2008 are likely to be more  
8 liquid than municipal bonds that were not transacting on  
9 September 19th, 2008?

10 A. By virtue of the fact that they're trading, but that's not  
11 necessarily a measurement of liquidity.

12 Q. Are you familiar with the concept of Level 1, Level 2 and  
13 Level 3 categorizations for assets?

14 A. Generally familiar.

15 Q. Did you perform any analysis to determine whether the  
16 twenty-six bonds you valued were Level 1, 2 or 3?

17 A. I did not perform that analysis.

18 Q. Would it surprise you to learn -- would it be consistent  
19 with your understanding that all twenty-six of those municipal  
20 bonds were categorized by Lehman as Level 2?

21 A. That wouldn't surprise me.

22 Q. And is it your understanding that a Level 2 bond or Level  
23 2 asset does not have a reliable daily transaction price, that  
24 it has to be valued through some other method than using a  
25 reliable daily transaction price in that particular CUSIP?

1 A. Repeat the question, please.

2 Q. Is it your unders -- am I correct, is it your  
3 understanding that a Level 2 asset is one which cannot be  
4 valued by a daily transaction price in that CUSIP?

5 A. I'm generally familiar with that.

6 Q. And are you familiar with the fact that a Level 2 asset  
7 might have a daily transaction price because, say, one or two  
8 people sold the CUSIP that day but that doesn't mean that the  
9 third person holding that CUSIP is going to get the same price?

10 A. It could be. But again, I think the comparability  
11 analysis and the criterion that I set out is a good indication  
12 of value.

13 Q. Am I correct, Mr. Schwaba, that you did not perform any  
14 analysis to determine how many of the comparable securities you  
15 used in your comparables analysis were categorized as Level 1,  
16 2 or 3?

17 A. That is correct.

18 Q. And am I correct that those securities might include Level  
19 2 securities even though there may have been a few transactions  
20 in that security on September 19th?

21 A. They could have also included Level 1.

22 Q. It could have been either Level 1 or Level 2, correct?

23 A. That's true.

24 Q. Okay. Now you gave some testimony about auction-rate  
25 securities. Do you recall that?

1 A. Yes.

2 Q. And there were auction-rate securities in the selection of  
3 twenty-six municipal bonds that you valued, correct?

4 A. That is correct.

5 Q. And are you also familiar with the concept of adjustable-  
6 rate securities?

7 A. Yes, I am.

8 Q. Okay. And before I ask you the next question, let me just  
9 confirm something. Am I correct that prior to your engagement  
10 in this case, you do not have any direct recollection of any  
11 involvement with auction-rate securities?

12 A. Yes. However, I have thirty-five years experience in the  
13 fixed income and municipal markets.

14 Q. I understand that. I'm just specifically asking about  
15 auction-rate securities. Am I correct that prior to your  
16 involvement in this case, you don't have any direct  
17 recollection of any involvement with auction-rate securities?

18 A. That is correct.

19 Q. Now, I'd like to put up a demonstrative of our own which  
20 is -- this is the first one, Schwaba 1. Would you agree with  
21 me, Mr. Schwaba, that as this demonstrative shows, auction-rate  
22 securities are a subset of a broader category described as  
23 adjustable-rate securities?

24 A. I would accept that.

25 Q. When you say you would accept that, would you agree with

1 that?

2 A. Yes, I would.

3 Q. All right. And in other words, would you agree that  
4 auction-rate securities are adjustable-rate securities whose  
5 adjustable rates are determined and set through an auction?

6 A. That is correct.

7 MR. HUME: Could I show the second demonstrative,  
8 please?

9 Q. Now, I think you were actually asked that question in  
10 deposition. The question was: "So can we agree on the  
11 definition of auction-rate securities as adjustable-rate  
12 securities whose adjustable rate is determined through an  
13 auction process?"

14 "A. I would accept that."

15 Do you see that?

16 A. Yes, I do.

17 Q. And would you agree that that's an accurate definition of  
18 auction-rate securities?

19 A. Yes.

20 Q. Okay. Now could I now ask you to look --

21 MR. HUME: And, by the way, we do have a binder of  
22 exhibits. Maybe we should hand that up.

23 (Pause)

24 THE COURT: Thank you.

25 (Pause)

1 Q. Sorry for the disruption.

2 A. Sure.

3 Q. Do you have a copy of the binder?

4 A. No, I don't.

5 Q. No you don't?

6 A. I'm sorry. You mean -- no. I was never handed one.

7 Q. Okay.

8 (Pause)

9 MR. HUME: And could we just put up the demonstrative  
10 again, please?

11 Q. Now I just want to -- you would agree, again, as this  
12 demonstrative shows, that auction-rate securities are a subset  
13 of adjustable-rate securities, correct?

14 A. Yes.

15 Q. And You would agree that those auction-rate securities are  
16 adjustable-rate securities whose adjustable rate is set at  
17 auction, correct?

18 A. Determined through an auction process, yes.

19 Q. Determined through an auction process. Can I now refer  
20 you, please -- and we'll put it up on the screen so you don't  
21 need to use the binder. But it is in tab 3 of our binder -- is  
22 your declaration from July 15th -- and refer you to paragraph 7  
23 and paragraph 8. And paragraph 7 says, "As a threshold  
24 matter" -- now you were responding here, as you can see if you  
25 look to what we argued in our motion to exclude your and other

1 testimony. Paragraph 7 says, "As a threshold matter, I was  
2 asked questions by counsel in my deposition in this matter  
3 about auction-rate securities. Having been asked to adopt a  
4 definition for auction-rate securities that equated auction-  
5 rate securities to adjustable-rate securities." Do you see  
6 that?

7 A. Yes, I do.

8 Q. And --

9 MR. HUME: Can we have that highlighted, please, that  
10 phrase?

11 Q. Now the question you say you were asked and answered that  
12 asked you to adopt that definition is as follows, and it's the  
13 one we just looked at: "So can we agree on a definition of  
14 auction-rate securities as adjustable-rate securities whose  
15 adjustable rate is determined through an auction process?" And  
16 your answer was, "I would accept that." Do you see that?

17 A. I do.

18 Q. Now isn't it true, Mr. Schwaba, that this question does  
19 not ask you to assume a definition of auction-rate securities  
20 that equates auction-rate securities with adjustable-rate  
21 securities?

22 A. There was some confusion there. Auction-rate securities  
23 are a subset of adjustable-rate securities. Not every  
24 adjustable rate is an auction-rate security.

25 Q. Well, but my question, Mr. Schwaba, is why did you feel

1 the need in your declaration to say that you were asked to  
2 adopt the definition that equated auction-rate securities with  
3 adjustable-rate securities?

4 A. My original anal -- my analysis was talking about  
5 auction -- or, excuse me -- adjustable-rate securities. There  
6 was some confusion there.

7 Q. You go on to say: "In answering the question and  
8 subsequent questions, I understood Barclays' counsel to be  
9 asking me to equate auction-rate securities with adjustable-  
10 rate securities and my responses were based upon that  
11 understanding." Do you see that?

12 A. Yes, sir.

13 Q. And was that a truthful statement in your declaration?

14 A. Yeah. I was interpreting it at that particular -- in that  
15 particular way. And there was some confusion.

16 Q. Okay. So this is a truthful statement in your  
17 declaration, correct?

18 A. Yes.

19 Q. Okay. I'd like to now show you the deposition testimony  
20 that follows this question and answer on pages 30, line 18, to  
21 31, line 7. This is the longer question and answer -- I'm  
22 sorry. I misspoke. This is the longer question and answer  
23 that leads up to the question and answer you block-quoted in  
24 your declaration. First question is: "Sure. Let's define our  
25 terms. Would it be fair to say -- would it be fair to define

1 an adjustable-rate security as one where the interest rate is  
2 adjusted by some mechanism over time?"

3 "A. I would agree with that.

4 "Q. And one of the potential mechanisms for adjusting interest  
5 rates is an auction process, is that correct?

6 "A. I would agree with that.

7 "Q. So can we agree on a definition of auction-rate securities  
8 as adjustable-rate securities whose adjustable rate is  
9 determined through an auction process?

10 "A. I would accept that."

11 Were those answers truthful at the time?

12 A. Yes.

13 Q. Is it your testimony, sir, that those questions and  
14 answers were asking you to adopt a definition of auction-rate  
15 securities that equated auction-rate securities with  
16 adjustable-rate securities?

17 A. To be honest about it, I was confused at the time. And  
18 I'm still not clear in terms -- I know what an adjustable-rate  
19 security is. I know what auction-rate securities are. And I  
20 don't necessarily agree -- or understand the conclusion we're  
21 talking about here.

22 Q. My question to you --

23 MR. HUME: May we go back to the declaration, please,  
24 paragraph 7?

25 Q. My question, sir, is do you still believe, and is it still



1 your testimony that, as stated in the first sentence of  
2 paragraph 7 of your declaration, that you were asked to adopt a  
3 definition for auction-rate securities that equated auction-  
4 rate securities to adjustable-rate securities?

5 A. To the extent that auction-rate securities and adjustable-  
6 rate securities are instruments whose rate is determined on a  
7 periodic basis.

8 Q. Sir, I understand that in some of your testimony you said  
9 you were confused -- or there was confusion.

10 A. Right.

11 Q. And I'm not asking you was there confusion. I'm asking  
12 you is it your testimony today that you believe that you were  
13 asked in deposition by my partner, Mr. Shaw, to adopt a  
14 definition for auction-rate securities that equated auction-  
15 rate securities to adjustable-rate securities? Is it your  
16 testimony that that's what you believe you were asked?

17 A. That would be correct, yes.

18 Q. And you believe you were asked that in this question and  
19 answer that you quote right here, correct?

20 A. Exactly. That's what it says.

21 Q. And then you had that understanding in answering  
22 subsequent questions, correct?

23 A. I believe I did.

24 Q. Well, you say here, "In answering" -- in paragraph 8 of  
25 your declaration -- "In answering this question and subsequent

1 questions, I understood Barclays' counsel to be asking me to  
2 equate auction-rate securities with adjustable-rate securities  
3 and my responses were based upon that understanding." Do you  
4 see that?

5 A. Yes, I do.

6 Q. And was that a truthful statement when you said it in your  
7 declaration?

8 A. Yes.

9 Q. And does it remain truthful today?

10 A. Based on my understanding of it, yes.

11 Q. All right. Could I ask you now to look at -- and we'll  
12 put it up on the screen -- an excerpt from your deposition that  
13 follows two pages after this question and answer, from page 33,  
14 line 20, to 34, line 23. So this over here on the left is 33,  
15 line 20. It goes to the bottom and starts up here on page 34.  
16 And this is page 34 of the deposition. You were asked the  
17 question, page 33, line 20: "How many of them were auction-  
18 rate securities?" Do you see that?

19 A. I do.

20 Q. And your answer is -- and he's asking about how many of  
21 the bonds that you valued. Do you recall that?

22 A. Yes, I do.

23 Q. And your answer is "My understanding is that there twenty  
24 auction-rate or we refer to them as adjustable. But twenty  
25 were of that type." You go on to say "except there was one

1 that was an OID adjustable or auction-rate as well. The  
2 dynamics of pricing of that were kind of a combination." And  
3 you go -- then say, "But basically, what I'm saying is that my  
4 understanding is that the nineteen were what you would term  
5 auction-rate securities." Do you see that?

6 A. I do.

7 Q. And was that truthful testimony when you gave it?

8 A. It was truthful testimony and I acknowledge that I was  
9 confused at that particular point in time.

10 Q. Okay. The next question is:

11 "Q. Well, just so I'm clear, your testimony is that nineteen  
12 of the securities you looked --"

13 And then you give an answer: "Twenty were labeled as  
14 adjustable-rate securities. Okay?"

15 See that?

16 A. I do.

17 Q. And then the question is -- we do down here:

18 "Q. And your testimony is that of those twenty that were  
19 labeled adjustable-rate securities, nineteen of them were  
20 auction-rate securities or twenty were auction-rate  
21 securities?"

22 Do you see that question?

23 A. Yes, I do.

24 Q. And my question to you, Mr. Schwaba, is when you heard  
25 that question, was it your understanding that you were being

1 asked to assume and adopt a definition of auction-rate  
2 securities that equated them with adjustable-rate securities?

3 A. If I understand your answer correctly, yes.

4 Q. Well, I want to make sure you understand my question  
5 correctly. This question that I've just pointed out to you on  
6 page 34, lines 14 to 17 of your deposition is asking you: "Of  
7 the twenty that you just said were labeled as adjustable-rate  
8 securities, how many were auction-rate, nineteen or twenty?"

9 Do you see that?

10 A. Yes, I do.

11 Q. And is it your testimony, sir, that when you were asked  
12 this question you believed you were being asked to adopt a  
13 definition of auction-rate securities that equated them with  
14 adjustable-rate securities?

15 A. Yes. I was obviously in error at that time.

16 Q. Okay. Was your error -- I'm sorry, we'll move on quickly,  
17 but was your error, Mr. Schwaba, based upon a confusion that  
18 you had or was it based upon being asked by Barclays' counsel  
19 to adopt a definition of auction-rate securities that equated  
20 them with adjustable-rate securities?

21 A. I believe it was an error in confusion on my part. I  
22 understand -- did understand the difference between auction-  
23 rate securities and other adjustable-rate securities.

24 Q. You go on in your declaration to say in paragraph 10 that  
25 of the twenty-one adjustable-rate bonds nine were auction-rate

1 securities, do you see that?

2 A. That's cor -- yes, sir.

3 Q. And so after the deposition, I take it, you went back and  
4 looked and discovered that it was nine, not nineteen or twenty,  
5 correct?

6 A. I believe I knew that it was nine prior to that time.

7 Q. But it was just confusion during the deposition?

8 A. There was confusion on my part, yes.

9 Q. So I want to move on past that confusion --

10 A. Sure.

11 Q. -- to just address these nine now. For those nine  
12 auction-rate securities, Mr. Schwaba, am I correct that all of  
13 them had failed at auction prior to September 19, 2008?

14 A. That is correct.

15 Q. And in performing your valuation work for your initial  
16 report, am I correct that you didn't look to see which ones of  
17 these had failed at auction or not?

18 A. I'm sorry, in terms of the --

19 Q. In performing --

20 A. Can you repeat the question, please?

21 Q. Sure. In performing your work in producing your initial  
22 valuation report in this case, am I correct that you did not  
23 examine which of those auction-rate securities had failed at  
24 auction?

25 A. I believe there was some analysis done in terms of what

1 happened in terms of auctions. I couldn't say that I could  
2 give you an answer on all of them but I know there was some  
3 analysis done on that.

4 Q. And did you have the analysis done for you by someone  
5 else?

6 A. It was at my direction.

7 Q. Did you ever at any time personally review how frequently  
8 any one of those nine auction-rate securities had failed versus  
9 not failed at auction prior to September 19, 2008?

10 A. I believe there was some recollection but I -- or some  
11 analysis on my part but I don't have a specific recollection.

12 Q. Do you believe that analysis would have been in your work  
13 papers?

14 A. I do not believe it is, no.

15 Q. Let me ask you to turn -- and again, we'll put it up on  
16 the board if that's easier -- to tab 19 of the binder which  
17 relates to one of these auction-rate securities and gives its  
18 failure history prior to September 2008. Do you recognize this  
19 to be one of the auction-rate securities?

20 A. Yes, I do.

21 Q. And you see here in chronological order from the bottom up  
22 gives its history of auctions. January 10th it had success,  
23 you see that?

24 A. Yes, I do.

25 Q. But starting March 20, 2008, failed auction. Do you see

1 that?

2 A. I do.

3 Q. April 24, 2008, failed auction. Do you see that?

4 A. Yes, sir.

5 Q. May 29, 2008, failed auction. Do you see that?

6 A. I do.

7 Q. July 3, 2008, success. Do you see that?

8 A. Yes.

9 Q. And then August 7th and September 11, 2008, two separate  
10 occasions, it fails at auction. Do you see that?

11 A. Yes, I do.

12 Q. And am I correct, sir, that you valued this auction-rate  
13 securities at 100 cents on the dollar at par?

14 A. I do. And in fact, I do remember seeing this as well.

15 Q. Can I go to tab 20, please? And do you recognize that  
16 Georgetown University, D.C. Savers Taxable SERA as another one  
17 of the auction-rate securities you valued?

18 A. Yes, sir.

19 Q. And you see here that from February 27, 2008 through to  
20 August 20, 2008, on one, two, three, four, five, six successive  
21 occasions it failed at auction?

22 A. That's correct.

23 Q. And am I correct, sir, that you valued this auction-rate  
24 securities at par?

25 A. Yes.

1 Q. And in valuing it at par, Mr. Schwaba, was the fact that  
2 it had failed successively at six straight auctions relevant to  
3 your valuation in any way?

4 A. No, actually it wasn't. The -- just because an auction  
5 security failed did not mean it wasn't -- it didn't -- it  
6 doesn't have value. Barclays itself, again, priced four  
7 auction-rate securities that had failed at par on September  
8 19th.

9 Q. Can I ask you to turn to tab 21, please? Tab 21 relates  
10 to the Norman, Oklahoma Regional Hospital Authority. Do you  
11 recognize this to be an auction-rate security that you valued  
12 in this case?

13 A. Yes, sir.

14 Q. And do you see this document shows that from February 2008  
15 to September 17, 2008 it failed at auction six times?

16 A. Yes.

17 Q. And did you take that into account in valuing this bond  
18 for purposes of your valuation report in this case?

19 A. Same answer as before. I think, again, because -- just  
20 because an auction-rate security fails does not mean it doesn't  
21 have value.

22 Q. You believe you looked at this sort of information in  
23 formulating your report?

24 A. Yes.

25 Q. But it didn't make it into your work papers, is that



1 correct?

2 A. I don't believe it did.

3 Q. Let me just quickly go through the remainder. Tab 22 of  
4 the binder shows California HSG Financial Agency. Do you know  
5 what this is, what part of California this is, what agency?

6 A. I do not recollect.

7 Q. All right. Do you recognize this to be one of the  
8 auction-rate securities you valued in this case?

9 A. I believe it is, yes.

10 Q. And you see that it failed at auction on August 7, 2008?

11 A. That's correct.

12 Q. And I take it it's the same answer with respect to your  
13 consideration of this as with the others?

14 A. Yes, sir.

15 Q. And tab 23, Illinois Health, do you recognize this to be  
16 one of the auction-rate securities you valued in this case?

17 A. Yes, sir.

18 Q. And you see that it failed at auction six times leading up  
19 to and including November -- September 17, 2008?

20 A. That's correct.

21 Q. And just so I'm clear, that means if someone held this  
22 security on September 17, 2008 or September 19, 2008, there was  
23 no way for them to sell it unless there was subsequently a  
24 successful auction, correct?

25 A. It could have been redeemed.

1 Q. Could have been redeemed by the bank who issued it?

2 A. Theoretically, yes.

3 Q. Next tab shows Montana State Health Facility, do you see  
4 that?

5 A. Yes, I did.

6 Q. Do you recognize that to be one of the auction-rate  
7 securities you valued in this case?

8 A. Yes.

9 Q. And do you see that leading up to September 19, 2008 it  
10 failed at auction, one, two, three, four, five, six times?

11 A. Yes, sir.

12 Q. Okay. And do you believe you took this into account in  
13 reaching your opinion?

14 A. Yes, I did.

15 Q. But am I correct that your opinion was to value this at  
16 par irrespective of the fact that it had failed at auction six  
17 times?

18 A. That is correct.

19 Q. And since I didn't do it clearly for the record, all the  
20 other auction-rate securities that we've looked at thus far,  
21 you valued each of them at par, correct?

22 A. That is correct.

23 Q. And the final one, tab 25, relates to New York State  
24 Energy. Do you understand what this refers to, Ration Dev  
25 Authority?

1 A. Yes, I do.

2 Q. Okay. What is it?

3 A. That's the New York State Energy Research and Development  
4 Authority. Its revenues are gas related revenues in Brooklyn,  
5 I believe.

6 Q. And do you recognize this to be one of the auction-rate  
7 securities you valued in this case?

8 A. Yes, I do.

9 Q. And you see that leading up to and including November 17,  
10 2008 it failed at auction six times?

11 A. That is correct.

12 Q. And am I correct that you valued this security at par?

13 A. That is right.

14 Q. Now, Mr. Schwaba, just so we're clear, the record is  
15 clear, for all seven of those CUSIPs we just looked at, you  
16 recognized they failed at auction --

17 A. Yes.

18 Q. -- prior to September 19, 2008, and you valued each one of  
19 them at par?

20 A. That is correct.

21 MR. HUME: And Your Honor, since the witness has  
22 testified he did look at these screen shots, I would ask that  
23 these exhibits be moved into evidence.

24 MR. TAMBE: Your Honor, we have no objection.

25 THE COURT: They're admitted.

1 (Screen shots were hereby received into evidence as of this  
2 date.)

3 Q. Mr. Schwaba, am I correct that a failed auction-rate  
4 securities would trade below par and may be subject to  
5 restricted liquidity?

6 A. It could happen.

7 Q. Am I correct that in your original report, sir, you wrote  
8 that failed auction-rate securities would trade below par and  
9 may be subject to restricted liquidity?

10 A. Again, I used the term "would" and what I meant to say  
11 what I should have said was "could".

12 Q. Let me ask you to refer to tab 3 of your binder which is  
13 your July 15th declaration, in paragraph 17, which we'll also  
14 put up on the screen. And you state there, "In my expert  
15 report dated March 15, 2010, in appendix 3, paragraph 30, I  
16 state that, quote, 'failed ARS would trade below par and may be  
17 subject to restricted liquidity.'" Do you see that?

18 A. I do.

19 Q. You then say, "This statement incorrectly characterizes my  
20 opinions regarding failed auction-rate securities." Do you see  
21 that?

22 A. Yes, I do.

23 Q. And so am I correct that you are saying here in your  
24 declaration that a sentence written in your original report  
25 incorrectly characterizes your opinion?

1 A. That would be correct.

2 Q. And the reason you say it's incorrect is that,  
3 essentially, it may or may not trade below par if it's failed  
4 at auction, correct?

5 A. That would be correct.

6 Q. As you say in your deposition that, quote, second line up  
7 from the bottom, "They could trade below par, but not  
8 necessarily." Do you see that?

9 A. Yes.

10 Q. And so is your testimony that if a -- a failed auction-  
11 rate security may trade below par but may not?

12 A. That's correct.

13 Q. And is there any specific feature that you have identified  
14 as to whether or not a failed auction-rate security will or  
15 will not trade below par?

16 A. I have not identified specific --

17 Q. Let me ask you, am I correct that you originally  
18 identified two of the auction-rate securities that had failed  
19 at auction at above par?

20 A. That is correct.

21 Q. And then subsequently changed that par?

22 A. That is correct.

23 Q. And is the reason you changed it to par because you  
24 realized they had failed at auction?

25 A. Based on the analysis that I had done, they were auction-

1 rate securities and therefore were priced at par.

2 Q. Am I correct --

3 A. By the way, there were -- again, I'll say again that  
4 Barclays also priced four securities -- four auction-rate  
5 securities that had failed at par as well on September 19th.

6 Q. Am I correct, sir, that you valued some of these auction-  
7 rate securities by looking at comparables?

8 A. Yes.

9 Q. Am I correct, sir, that you did not determine, in  
10 selecting the comparables, whether the comparables included any  
11 auction-rate securities that had failed at par?

12 A. That was my initial analysis, that's correct. There was  
13 an amendment to the criteria, adding auction-rate securities as  
14 one of those criteria.

15 Q. Okay. So initially you selected a group of comparables  
16 without determining whether any of them had been auction-rate  
17 securities that failed at par?

18 A. That --

19 Q. That failed at auction, correct?

20 A. That was the adjustable-rate securities.

21 Q. And you subsequently did an analysis -- did you -- you  
22 didn't do a different analysis with different comparables, did  
23 you?

24 A. No.

25 Q. Did you subsequently do an analysis to determine how many

1 of your comparables happened to include auction-rate securities  
2 that had failed at auction?

3 A. The additional criterion I used was the failed auction-  
4 rate securities that traded on September 19, 2008.

5 Q. Well, you -- are you referring to what you say in your  
6 declaration? Let me just refer you to this. In your  
7 declaration which is at tab 3, paragraph 19, you refer to a  
8 universe; let's just look at it and highlight it. You say,  
9 "From the universe of adjustable-rate securities that traded on  
10 September 19, 2008, and using Bloomberg reported auction  
11 history, I was able to identify 93 out of 157 auction-rate  
12 securities that traded on September 19, 2008 and experienced a  
13 failed auction on or before September 19, 2008." Do you see  
14 that?

15 A. That's right.

16 Q. And this was an analysis performed after your deposition  
17 in this case, correct?

18 A. That is correct.

19 Q. And am I correct that these ninety-three securities you  
20 reference in paragraph 19 of your declaration were not  
21 securities that were part of your population of comparable  
22 bonds used in your comparables analysis?

23 A. There were sixteen auction rates initially, and I believe  
24 eleven of those failed and they -- that might have -- they may  
25 have been included in the ninety-three failed because they

1 failed their auction-rate securities.

2 Q. Let me make sure I understand. You're saying that some of  
3 the securities referenced in paragraph 19 of your declaration  
4 may have been in your population of comparables, is that  
5 correct?

6 A. Yes.

7 Q. But am I correct that what you're describing in paragraph  
8 19, the ninety-three securities, you're not describing your  
9 population of comparables, you're describing a subsequent  
10 analysis?

11 A. I'm describing the additional criterion I used which  
12 factored in the ninety-three comparables -- excuse me, ninety-  
13 three auction-rate securities that failed on September 19th.

14 Q. You're reporting on an analysis to determine how many  
15 failed auction-rate securities traded on September 19th; that's  
16 what you're doing in this paragraph, correct?

17 A. That's right.

18 Q. And you are not describing or analyzing the population of  
19 comparables that you used in your valuation, correct?

20 A. That's part of the valuation, if I understand you  
21 correctly.

22 Q. Well, but this isn't the group of comparables that you  
23 used in your valuation, correct?

24 A. Some of the comparables are included in this because  
25 they --



1 Q. Do you know how many?

2 A. -- failed at auction.

3 Q. What I'm trying to say is there may be overlap but do you  
4 know how many --

5 A. I believe there were -- I -- there -- I believe there were  
6 16 auction-rate securities in my original analysis that were  
7 auction-rate securities and therefore by definition would be  
8 involved in the 157 which included both.

9 Q. So 16 of the 157 securities referenced in paragraph 19 of  
10 your declaration would have been included in your population of  
11 comparables that you used in your valuation analysis?

12 A. In my orig -- yeah, that's correct.

13 Q. Now, am I correct, sir, that in analyzing either those  
14 sixteen --

15 MR. HUME: Let me withdraw that because I just want to  
16 make one other thing clear.

17 Q. I thought I understood in your direct testimony that you  
18 said something about sixty-four of the ninety-three securities  
19 that you reference in 19, paragraph 19. Did sixty-four of the  
20 ninety-three fail?

21 A. No, no, no, 64 -- there were 157 auction-rate securities  
22 on -- that traded on September 19, 2008; 93 failed, 64 did not  
23 fail.

24 Q. Okay. Now, would you agree with me, Mr. Schwaba, that in  
25 September of 2008 the market for auction-rate securities was

1 essentially frozen, notwithstanding these trades that you've  
2 identified?

3 A. I would accept that characterization up to a point. There  
4 were ninety-three auction-rate securities trading. There were  
5 sixty-four that had successful auction that were trading on  
6 that day. And again, Barclays priced four securities at par on  
7 that same day as well, of failed auction-rate securities.

8 Q. Mr. Schwaba, were you aware of the fact that in September  
9 2008 financial institutions were offering to buy back failed  
10 auction-rate securities from their individual investors?

11 A. I'm aware of that information.

12 Q. Did you do anything in your analysis to attempt to screen  
13 out any auction-rate securities that had failed at auction that  
14 traded on September 19, 2008 but traded only because they were  
15 being bought back by investment houses that were offering to  
16 buy back from their individual investors?

17 A. My understanding is that that information is not able to  
18 be deduced based on the information in the MSRB.

19 Q. So you were not able to screen out for that information,  
20 correct?

21 A. I did not -- was not able to or did not do that.

22 Q. Can I ask you to turn quickly to tab 13 of your binder.  
23 We'll put it up on the screen. And this is an article -- an  
24 online article from The Economist magazine dated August 14,  
25 2008, "Kicked in the ARS". Do you see that?

1 A. I do.

2 Q. At the end of the first paragraph -- well, at the  
3 beginning of the first paragraph it says, "Like a Moroccan  
4 bazaar was how William Galvin, Massachusetts Secretary of  
5 State, described the market for auction-rate securities whose  
6 collapse has left thousands of investors stuck with debt they  
7 assumed they could easily sell." Do you see that?

8 A. Yes, I do.

9 Q. Is that consistent with your understanding of what had  
10 happened in the market for auction-rate securities in September  
11 2008?

12 A. That's another interpretation; I have not seen this one  
13 before.

14 Q. The last sentence of this paragraph says, "Banks, on the  
15 other hand, have moved quickly under pressure to buy back the  
16 paper they flogged in what looks like the biggest ever forced  
17 bailout of Main Street by Wall Street." Do you see that?

18 A. I do.

19 Q. And did you understand that to be referring to the fact  
20 that state regulators had put immense pressure on major Wall  
21 Street banks to buy back failed auction-rate securities from  
22 their individual investors?

23 A. That's information and I've heard words to that effect  
24 before.

25 Q. Did you --

1 A. I don't know that for a fact to be true.

2 Q. Did you understand -- whatever you understood about it,  
3 did you understand that those buy-back operations were not  
4 going to apply to a major financial institution like Barclays  
5 that happened to own failed auction-rate securities?

6 A. I -- repeat the question again, please?

7 Q. Well, whatever your understanding was of the buy-backs  
8 referenced in this article, did you understand that it did not  
9 include anyone buying back auction-rate securities from an  
10 institution like Barclays?

11 A. I did not under -- not quite understand that. All I know  
12 is that Barclays, again, priced four securities at par that had  
13 failed auction-rate securities.

14 Q. When you say they priced at par, they also took a bid  
15 offer adjustment, correct?

16 A. I don't know whether they took a bid offer adjustment or  
17 not; I know they priced it at par, at 100.

18 Q. Did -- is it correct that they then adjusted it by some  
19 percentage to reflect what was a real -- what they thought was  
20 a realistic exit price where they might actually be able to  
21 transact in the security?

22 A. I don't know whether they did or not.

23 Q. Okay. Am I correct that in your valuations you took no  
24 adjustment to adjust the values you arrived at to a bid price  
25 that could be a realistic transaction price for Barclays?

1 A. I took traded prices. These are securities that traded in  
2 the market at par.

3 Q. Can I ask you to turn to tab 8 of your binder?

4 MR. HUME: Before I do, Your Honor, may I ask that the  
5 exhibit at tab 13, BCI Exhibit 1017, be moved into evidence for  
6 the limited purpose of showing public awareness of buy-back  
7 operations with respect to auction-rate securities?

8 MR. TAMBE: We would have an objection based on  
9 hearsay. We hadn't seen this document until we got this  
10 binder. I understand it's being offered for a limited purpose  
11 but we do have an objection both for lateness as well as to  
12 hearsay.

13 THE COURT: Well, it appears to have been printed off  
14 the Internet on September 28, 2010. The questions are in the  
15 record about --

16 MR. HUME: We'll deal with the --

17 THE COURT: About what --

18 MR. HUME: Your Honor --

19 THE COURT: About what --

20 MR. HUME: -- we'll withdraw the --

21 THE COURT: -- the witness knew about this subject  
22 of --

23 MR. HUME: Right.

24 THE COURT: -- buy-backs of auction-rate securities at  
25 the time. And before deciding on admissibility, perhaps the

1 parties can meet and confer. I'm going to provisionally simply  
2 reserve on this.

3 MR. HUME: Thank you, Your Honor.

4 BY MR. HUME:

5 Q. Tab 8 of the binder, Mr. Schwaba, is a press release from  
6 Credit Suisse dated September 17, 2008, do you see that?

7 A. Yes, I do.

8 Q. And it states, "Credit Suisse today announced that it has  
9 reached a settlement agreement with the Attorney General of the  
10 State of New York and the North American Securities  
11 Administrators Association Task Force whereby Credit Suisse  
12 will offer to repurchase, at par, auction-rate securities held  
13 by eligible individual investors, charities and certain  
14 businesses." Do you see that?

15 A. I do.

16 Q. Did you take this information into account in determining  
17 whether the auction-rate securities that you found that traded  
18 at par on September 19th might reflect these kinds of buy-back  
19 operations?

20 A. My view is that by and if the time the auction-rate  
21 security is traded in the market this information probably  
22 would have been fact -- would have been factored in, in terms  
23 of the market price, if that is in fact the case.

24 Q. When you say "factored in", are you suggesting that  
25 Barclays might be able to sell auction-rate securities to an

1 individual who would then be able to capitalize on this kind of  
2 buy-back?

3 A. No, no, no, I'm sorry, that's not at all what I'm saying.

4 Q. Okay.

5 A. I'm saying if I understand this -- if I understood this  
6 that Barclays -- or excuse me, Credit Suisse would be dealing  
7 directly with individuals at a price, whatever price it was,  
8 then that's what it is. But the MSRB data, which is publicly  
9 data, those prices clearly were par.

10 Q. Let me ask you to turn quickly to tab 9. This is a  
11 Goldman Sachs announcement dated August 21, 2008. Do you see  
12 that? Do you see the date August 21, 2008?

13 A. Yes, I do.

14 Q. And it states, "The Goldman Sachs Group, Inc.. today  
15 announced that Goldman Sachs & Co. has entered into a  
16 settlement in principal with the Office of the Attorney General  
17 of the State of New York and the Illinois Securities Department  
18 on behalf of the North American Securities Administrators  
19 Association regarding auction-rate securities." Do you see  
20 that?

21 A. I do.

22 Q. It goes on to say, "Under the settlement Goldman Sachs  
23 will offer to immediately repurchase, at par, the outstanding  
24 auction-rate securities that are held by its private wealth  
25 management clients and were purchased through the firm prior to

1 February 11, 2008." Do you see that?

2 A. I do.

3 Q. Now, am I correct, Mr. Schwaba, that you do not know how  
4 many of the auction-rate securities that you identified that  
5 had failed at auction and traded at par on September 19, 2008  
6 were the subject of these kinds of buy-back operations?

7 A. I do not know that.

8 Q. Isn't it possible then, Mr. Schwaba, that all of the  
9 auction-rate securities that you identified that had failed at  
10 auction and traded at par on September 19, 2008 were the  
11 subject of these kinds of buy-back operations?

12 A. Are you asking me if it's possible?

13 Q. Yes.

14 A. It's possible, but it's also possible that they may not  
15 have been.

16 Q. You don't know one way or the other, correct?

17 A. That's right.

18 Q. Have you reviewed the industry announcements along this  
19 line to determine whether any of them would have allowed  
20 Barclays to take advantage of such repurchase operations?

21 A. I have reviewed information related to this, but I -- it's  
22 not clear to me, based on my understanding of the trades that  
23 went through MSRB, that I'm able to discern whether any of  
24 these agreements ended up going through this -- through that  
25 path.



1 Q. If you look at tab 10 very briefly, you'll see an  
2 announcement from Wachovia on August 15, 2008. Wachovia  
3 announces, "Global agreement in principal to settle auction-  
4 rate securities". Do you see that?

5 A. Yes, I do.

6 Q. And if you look at the second paragraph it says much the  
7 same thing as the other ones, that "We understand the  
8 unprecedented market conditions have created difficulties for  
9 our clients, particularly those holding auction-rate  
10 securities." Do you see that?

11 A. Yes.

12 Q. Do you have any basis for disagreeing with that statement?

13 A. No.

14 Q. It then says, quote, "We are pleased to announce a  
15 comprehensive solution for the liquidity needs of clients who  
16 purchased auction-rate securities at Wachovia and to resolve  
17 this matter with federal and state regulators." Do you see  
18 that?

19 A. I do.

20 Q. And let me ask you quickly to move to tab 6 of the binder,  
21 BCI Exhibit 1012, which is a summary of auction-rate security  
22 buy-back information for retail customers. And you see there  
23 that it summarizes for each institution the date that  
24 institution announced its agreement to buy back and who it was  
25 buying back from: "Bank of America, February 13, 2008,

1 individual investors", do you see that?

2 A. Yes.

3 Q. "BNY Mellon Capital Markets, settlement announced October  
4 23, 2008". Second bullet says, "Agreed to buy back ARS of  
5 individual investors for ARS purchased between May and February  
6 2008", do you see that? May 2006 and February 2008. Do you  
7 see that?

8 A. I do.

9 Q. Now rather than walk through every one I'll just note for  
10 the record that there are numerous listed here over the next  
11 four pages, and, again, am I correct, Mr. Schwaba, that there's  
12 no way for you to say whether any of the transactions and  
13 failed auction rate securities that you identified on September  
14 19, 2008 were anything other than transactions pursuant to  
15 these kinds of repurchased operations?

16 A. Again, I'll say it's not clear that there were, it's not  
17 clear that there weren't, based on my understanding of the  
18 transactions in the MSRB.

19 Q. Am I correct, Mr. Schwaba, that you, in the errata that  
20 you explained earlier in your direct testimony, you changed the  
21 valuation of one CUSIP based upon a valuation you saw in a PwC  
22 price testing memo?

23 A. I do not recollect that.

24 Q. Let me ask you to look at tab 26 of your binder, which is  
25 a work paper of yours that was produced to us. We've

1 identified it as BCI Exhibit 1024. Do you recognize that  
2 document?

3 A. Yes, I do.

4 Q. And is that a document that reflects some of the work you  
5 did to value some of the CUSIPs shown on the document?

6 A. That is correct.

7 Q. And if I could ask you to look at the CUSIP identified as  
8 700404AA4 --

9 A. Yes.

10 Q. -- which is right there. You can see it a little more  
11 easily. You value it in this document at \$86.99 as it relates  
12 to par, correct?

13 A. Yes, that's -- that's --

14 Q. In other words, a hundred dollars in that column would  
15 mean par, correct?

16 A. That's right.

17 Q. And you value it here at 86.99, so, essentially, 86.9  
18 percent of par?

19 A. Yes. I think there was a confusion and just a  
20 transposition of numbers and that rendered the valuation, which  
21 was why we put the errata in there, what I put the errata into  
22 it.

23 UNIDENTIFIED SPEAKER: I'm not sure I understood.

24 Q. Well, originally you valued this CUSIP at over par,  
25 correct?

1 A. I'm trying to identify -- recall what this -- the identity  
2 of this CUSIP is.

3 Q. But am I correct that in the first column the 12.35  
4 million is the par amount?

5 A. That's correct.

6 Q. And if we look at your original report, which is at tab 1,  
7 and we look at Exhibit 2, which is the last page of the report.  
8 Now, this is your original report, not the corrected report.  
9 Then, for that CUSIP, doesn't it show an amount greater than  
10 that 12.3 million? It shows 12.8 million, correct?

11 A. That's right, and the second one would have been the  
12 corrected one.

13 Q. Right. My only question right now, sir, is in your  
14 original report you value that CUSIP greater than par?

15 A. That's right. And there is another CUSIP, also, that had  
16 been, I believe, out of order as well. One was higher than,  
17 the other one was lower than by a factor of a million or two  
18 million.

19 Q. And, sir, is the reason you changed the valuation of this  
20 CUSIP because you saw a value in a PwC price testing memo?

21 A. I don't recollect that at all.

22 Q. I'm going to ask you to look at tab 12 of your binder.  
23 And you'll see there BCI Exhibit 724, which is a February 8,  
24 2009 PwC memo. Do you see that?

25 A. Yes, I do.

1 Q. Did you ever review this document?

2 A. I do recall reviewing it.

3 Q. There is an attachment to this document called "Tab Sample  
4 with Prices", which is in your binder. We don't have all the  
5 attachments, but we have this attachment, and which is now up  
6 on the screen. And it shows, about a quarter of the way up  
7 from the bottom, a valuation for that CUSIP, 700404AA4. Do you  
8 see that?

9 A. Yes.

10 Q. And do you --

11 A. But I -- I --

12 Q. Do you see that it's valued at .838?

13 A. I don't recall seeing this portion of the document.

14 Q. Okay. Well, let me just ask you. Do you see that it's  
15 valued at .838?

16 A. Yes, I do.

17 Q. And do you understand that to be 83.8 percent of par?

18 A. I would accept that.

19 Q. And do you understand the parentheses to reflect an actual  
20 transaction in that CUSIP on September 22, 2008?

21 A. I will accept that.

22 Q. And would you agree than an actual transaction in a CUSIP  
23 that is not liquid and not trading would be the best evidence  
24 of its market value three days earlier?

25 A. Actually, I would take issue with that. I think it ought

1 to at least be the same day.

2 Q. All right.

3 A. That's --

4 Q. So you --

5 A. -- September 22nd. The date of valuation is September  
6 19th.

7 Q. Let me move on, Mr. Schwaba, to the CUSIPs you testified  
8 about that were valued at .001. Do you recall that?

9 A. Yes.

10 Q. And you said in your testimony that you did not have any  
11 idea, or no explanation, for why Barclays valued those CUSIPs  
12 at that amount. Do you recall that?

13 A. I do.

14 Q. Are you not aware, sir, that Barclays was simply, on those  
15 CUSIPs, adopting the BoNY marks, Bank of New York marks?

16 A. I don't know what they were doing. I was asked -- I  
17 looked at Barclays' marks, and what struck me was that the  
18 tenth of a penny marks were facially incorrect. In my thirty-  
19 five years I've never seen a, certainly an investment grade  
20 security, marked at that price.

21 Q. My question, just so the question is clear, Mr. Schwaba,  
22 is did you have an awareness, from any source, in preparing  
23 your work in this case that the .001 valuations applied to  
24 those five CUSIPs were taken from the BoNY marks?

25 A. No, I don't. These were seven -- there were seven CUSIPs.

1 Q. My apologies. Did you know that BoNY had marked those  
2 CUSIPs at .001?

3 A. No, I was looking at Barclays' marks.

4 Q. Just so I have a very clear answer. Did you know that  
5 BoNY had marked those CUSIPs at .001?

6 A. I don't recollect that.

7 Q. Am I correct that those CUSIPs did not show up in the  
8 search Navigant did for all CUSIPs with a valuation difference  
9 of greater than a million dollars between Barclays and BoNY?

10 A. The search for the difference greater than a million  
11 dollars, that criterion was established, but not by me, and I  
12 took those out of the criteria, and I then established, and  
13 then with reviewing other securities, and I clearly noticed the  
14 tenth of a percent -- excuse me. Tenth, yeah, tenth of a penny  
15 value on those. It struck me as facially incorrect.

16 Q. And Barclays has acknowledged that, correct?

17 A. I don't know whether they've acknowledged that or not.

18 Q. But it was never brought to your awareness that the Bank  
19 of New York is the institution that put those marks on those  
20 CUSIPs?

21 A. I'm just, you know, I -- I'd -- valuing the twenty-six  
22 securities and that's what I -- that's what I got, based on a  
23 million dollar threshold and then the seven securities.

24 Q. So it may or may not have been brought to your attention  
25 that BoNY had marked these at .001?

1 A. I'll admit that possibility but in terms of my  
2 recollection.

3 Q. Did you at any time consider, sir, what the FTID values --  
4 are you familiar with FTID?

5 A. Yes.

6 Q. Do you consider at any time what values Barclays found on  
7 its -- from FTID for these CUSIPs?

8 A. I believe there was mention in my original, or my report,  
9 that there was some FTID prices that Barclays --

10 Q. Okay.

11 A. -- could have noted but didn't. I may not have that  
12 recollection correct.

13 Q. And, more generally, sir, were you aware that  
14 PricewaterhouseCoopers, PwC, had reviewed the Barclays'  
15 valuations for its municipal bond portfolio as a whole?

16 A. I was aware that there was a review done.

17 Q. And am I correct, sir, that you did not review the entire  
18 municipal bond portfolio but only these twenty-six CUSIPs?

19 A. That's correct.

20 Q. And do you know how many total CUSIPs there were for  
21 municipal bonds?

22 A. I don't. No.

23 Q. And are you aware of the fact that Pricewaterhouse  
24 concluded that Barclays' valuations for the whole municipal  
25 bond portfolio were reasonable?



1 A. I can't recollect that conclusion.

2 Q. Am I correct, sir, that you don't have an opinion on the  
3 valuation for the entire municipal bond portfolio --

4 A. That is --

5 Q. -- only on the twenty-six CUSIPs you valued?

6 A. That's exactly right.

7 MR. HUME: Just one minute, sir.

8 (Pause)

9 MR. HUME: Your Honor, there are some PwC documents.  
10 I don't know that we need to take the time to question the  
11 witness with them based on his testimony, but we would like to  
12 move their admission. They are at tab 12 of the binder, the  
13 one I showed earlier, BCI-724. I'd like to move its admission.

14 MR. TAMBE: Objection, Your Honor, on hearsay grounds,  
15 and there has been discussion between the parties on some other  
16 PwC documents. We have objected to the wholesale moving in of  
17 any PwC documents.

18 MR. HUME: Well, perhaps, Your Honor, what we need to  
19 do is reserve some time to address this, because there are --  
20 this binder has, I think, just two, but there are a number of  
21 others we used with other witness which we think are business  
22 records, and would, therefore, not be hearsay. They would come  
23 within the business record exception, and we would try to work  
24 it out with counsel, but we have been trying for the last  
25 couple of weeks. We'd ask for a chance to offer them all into

1 evidence.

2 THE COURT: Let's reserve on the admissibility of 724  
3 and other comparable documents, but absent some showing or an  
4 agreement it appears that you're seeking to admit the valuation  
5 attachment through this document for the truth of what's stated  
6 in it, and I don't know if it's a business record or whose  
7 business record it is.

8 MR. HUME: It's not just the -- we were trying to --  
9 mostly we're trying to seek admission of the work papers  
10 themselves, the memos that PwC did.

11 MR. TAMBE: I don't think that fixes the problem, Your  
12 Honor. It might make it worse.

13 THE COURT: Well, it's just past 6 o'clock. Are  
14 you --

15 MR. HUME: Yes.

16 THE COURT: Are you done with your cross-examination  
17 at this point?

18 MR. HUME: I have one more question.

19 THE COURT: Let's reserve on the Pricewaterhouse  
20 documents for another day.

21 MR. HUME: Okay.

22 THE COURT: And if you have another question of the  
23 witness, ask that question. I'm just going to ask how much  
24 redirect there may be.

25 MR. TAMBE: Maybe a total of two minutes.

1 THE COURT: Fine.

2 BY MR. HUME:

3 Q. Mr. Schwaba, when you were at the Federal Home Loan Bank  
4 of Pittsburgh did you have any involvement at all with the  
5 motion filed by the Federal Home Loan Bank of Pittsburgh in  
6 this court seeking a Rule 60(b) challenge of the sale order in  
7 or around October, 2008?

8 A. No, I don't recollect that.

9 THE COURT: But I recall that. Mr. Tambe, why don't  
10 you proceed?

11 MR. TAMBE: Just one set of questions.

12 REDIRECT EXAMINATION

13 BY MR. TAMBE:

14 Q. You were asked a lot of questions about settlements and  
15 failed auctions. Just to go back. There were 157 auction rate  
16 securities that traded on the 19th, correct?

17 A. That's correct.

18 Q. Ninety-three of those had experienced failed auctions,  
19 correct?

20 A. Yes, sir.

21 Q. And those traded at par?

22 A. That's correct.

23 Q. But there were sixty-four others that had not experienced  
24 any failed auctions, correct?

25 A. That is correct.

1 Q. And those traded at par?

2 A. Yes, sir.

3 MR. TAMBE: Thank you, Your Honor. No further  
4 questions.

5 THE COURT: Mr. Schwaba, you're excused. Thank you.

6 THE WITNESS: Thank you, sir.

7 THE COURT: We'll resume tomorrow at 9:30.

8 MR. MAGUIRE: Yes, Your Honor. And Mr. Slattery will  
9 be our witness tomorrow.

10 THE COURT: Fine. See you tomorrow.

11 (Whereupon these proceedings were concluded at 6:05 p.m.)  
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I N D E X

T E S T I M O N Y

WITNESS	EXAM BY	PAGE	LINE
David Coles (video)	Mr. Thomas	16	1
Joseph Schwaba	Mr. Tambe	43	11
Joseph Schwaba	Mr. Hume	70	10
Joseph Schwaba	Mr. Tambe	115	12

E X H I B I T S

MOVANTS'	DESCRIPTION	ID.	EVID.
154A	Curriculum vitae of Joseph Schwaba		29
154	Joseph Schwaba's original expert report		39
154B	Joseph Schwaba's amended expert report		39
825	Declaration of Joseph Schwaba		40

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I N D E X, cont'd

E X H I B I T S, cont'd

BCI'S	DESCRIPTION	ID.	EVID.
538A	E-mail involving Martin Kelly	19	
585A	E-mail chain dated 9/22/08	31	
	involving Mr. Schwaba		
---	Screen shots		92

C E R T I F I C A T I O N

I, Lisa Bar-Leib, certify that the foregoing transcript is a  
true and accurate record of the proceedings.

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LISA BAR-LEIB

AAERT Certified Electronic Transcriber (CET\*\*D-486)

Veritext

200 Old Country Road

Suite 580

Mineola, NY 11501

Date: October 2, 2010